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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WORCESTER COUNTY, MARYLAND, *et al.*,
Petitioners,
v.
HONISS W. CANE, JR., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents alleged that Petitioner Worcester County, Maryland's at-large system of electing its governing body violated § 2 of the Voting Rights Act, 42 U.S.C. § 1973, which prohibits laws that "result[]" in dilution of minority voting strength. The courts below held that Respondents had shown, as required by *Thornburg v. Gingles*, 478 U.S. 30 (1986), that a compact single-member district with a black voting age population majority could be drawn, although the district Respondents proposed stretched the length of the County and disregarded traditional districting principles of compactness and respect for city boundaries. Despite Respondents' admission that this district was intentionally drawn on racial lines, the courts below rejected Petitioners' argument that it violated *Shaw v. Reno*, 113 S. Ct. 2816 (1993), which prohibits such intentional segregation of voters unless the resulting district is narrowly tailored to serve a compelling governmental interest. The courts below also held that, based on the "totality of circumstances," blacks had less opportunity than whites to participate in the political process and elect representatives of their choice, in violation of § 2. This holding was based solely on conclusory statements regarding past racial discrimination unrelated to any present inequality of opportunity for blacks to participate in the political process and an absence of black electoral success proportionate to the percentage of voting age blacks in the County's population. The questions presented are:

(1) Whether the courts below erred in holding that a racially gerrymandered majority-minority district satisfied *Gingles*' "geographical compactness" requirement, when that district violated *Shaw*'s prohibition against intentional racial segregation of voters absent a compelling governmental interest and narrow tailoring.

(2) Whether the courts below erred in holding that, based on the "totality of circumstances," Respondents had proved a § 2 violation.

PARTIES

The parties to this proceeding in the courts below were as follows: Worcester County, Maryland; George M. Hurley, John E. Bloxom, Reginald T. Hancock, Floyd F. Bassett, and Jeanne Lynch, as Members of the Worcester County Board of Commissioners; George H. Dryden, Hinson Finney, and Mark Frostrom, as Members of the Worcester County Board of Election Supervisors; Honiss W. Cane, Jr., Fannie Birckhead, James L. Purnell, Sr., Saunders Marshall, Edward V. DeShields, and William Waters, Worcester County Voting Rights Coalition and Worcester County Branch, NAACP; Washington Legal Foundation (*amicus curiae*); Center For Voting And Democracy (*amicus curiae*); and United States of America (*amicus curiae*).

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OPINIONS BELOW

The Fourth Circuit's Opinion is reported at *Cane v. Worcester County, Maryland*, 35 F.3d 921 (4th Cir. 1994), and is reproduced at App. 1a-16a, and the Fourth Circuit's denial of rehearing and rehearing in banc is reproduced at App. 45a-46a; the District Court's opinions are reported at *Cane v. Worcester County, Maryland*, 840 F. Supp. 1081 (D. Md. 1994), and 847 F. Supp. 369 (D. Md. 1994), and are reproduced at App. 17a-32a and App. 33a-42a, respectively.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was rendered on September 16, 1994. Petitioners filed a Petition for Rehearing and Suggestion for Rehearing In Banc on September 30, 1994, which was denied on Octo-

ber 12, 1994. This Petition for a Writ of Certiorari has been brought within ninety (90) days of said denial, as required by Supreme Court Rule 13.1. Review is sought pursuant to 28 U.S.C. § 1254(1). This is not a Cross-Petition and Petitioners know of no party who intends to file such a Petition; thus, the provisions of Supreme Court Rule 12.3 do not presently apply.

STATUTORY PROVISION INVOLVED

This appeal involves § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. The text of this statute is set forth at App. 64a.

STATEMENT OF THE CASE

A. The Complaint

Respondents, African-American residents and minority organizations in Worcester County, Maryland, challenged the at-large method of electing members of the County Board of Commissioners under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.* At the time this action was filed on November 16, 1992, the Board's five members were all elected at-large. Four of the members were required to reside in specified "residency districts." The fifth Board member was not required to reside in any particular district.

In May 1993, approximately six months before trial, in response to population changes reflected in the 1990 Census, the Board enacted Bill 93-6, which maintained the at-large electoral system and created a fifth residency district. Under this Bill, each Board member must reside in a separate residency district. The legislative findings accompanying Bill 93-6 reflect the Board's determination that a fifth population center had developed and that this change in demographic patterns warranted the crea-

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*** The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3) and 42 U.S.C. §§ 1973, 1983.**

tion of the fifth residency district. App. 3a. Thus, at the time of trial, the electoral system in effect was Bill 93-6, and not the system Respondents had challenged in their complaint.

B. The Trial

At trial, Respondents offered two alternative single-member districting plans that they had devised, each of which created a district with an African-American voting age population ("VAP") majority.[1] Respondents' expert who created this district admitted that he purposefully segregated citizens into separate voting districts on the basis of race:

> Q Mr. Cooper, in terms of how you prepared the map that contains or displays [the proposed majority-minority district], would it be fair to say that what you have done is, you have linked together the black population concentrations in these three noncontiguous communities in order to segregate black citizens into a separate district, wherein they will have a majority of the voting age population? Isn't that what you've done?
>
> A [By Mr. Cooper] Well, obviously, that's what we've done.

App. 48a.

By segregating black citizens into a separate district, Respondents created a district in which they would have over 60% of the voting age population. In doing so, however, Respondents ignored non-racial communities of interest. They instead justified their intentional use of race by claiming through their experts that "[i]f you drew districts recognizing that [racial] difference, you would just be recognizing what already exists." App. 48a.

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[1] One of Respondents' proposed plans had a 60% black VAP, and the other had a 65.1% black VAP. Although these two plans had majority-minority districts with different VAPs, the districts were substantially identical, and for ease of reference, the districts will be referred to as Respondents' proposed district.

This proposed majority-minority district disregarded traditional districting principles and legislative policy preferences reflected in the legislative history of Bill 93-6. App. 51a-57a. These choices included the policies of having each Commissioner represent the entire County population, thereby maintaining the direct accountability of each Commissioner to all voters, avoiding division of the municipalities in the County, and preserving communities of interest, as defined by common social, political, and economic interests.

C. The District Court's Liability Opinion

Following a three-day trial, on January 7, 1994, the District Court concluded that the at-large electoral system in existence prior to enactment of Bill 93-6 violated § 2. The District Court applied the three preconditions for § 2 liability established in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

> [F]or a successful § 2 challenge, the plaintiffs must prove three preconditions: 1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; 2) the minority group is politically cohesive; and 3) the majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. *Gingles*, 478 U.S. at 50-51.

App. 20a-21a. The District Court held that Respondents had satisfied all three preconditions. In particular, relying on the proposed plan submitted by Respondents, the District Court concluded that the minority community was sufficiently large and geographically compact to create a district with an African-American VAP majority (the first *Gingles* precondition). As the Court explained:

> While the plan does entail running the newly created districts across other voting district lines and through towns, this is unavoidable because of the heavy white population and the need to achieve a majority African-American population in one of the districts.

> The districts [proposed by Respondents] may not be symmetrical, but they are compact. They do not rely on districts that run through several "tentacle-like corridors" nor are the district's boundary lines so unreasonably irregular, bizarre or uncouth as to approach obvious gerrymandering. They are in line with the configurations of electoral districts that have been approved in other cases.

App. 22a.[2]

The District Court went on to state that it considered the "Totality of the Circumstances," App. 31a, in finding that the electoral system violated § 2, but commented only about discrimination occurring from the 1800s until the 1960s. Indeed, the District Court's analysis of this "totality" was limited to two paragraphs:

> Maryland and its political subdivisions bear a history of official racial discrimination against African-Americans. The Maryland Constitution of 1867 limited the right to vote to white males. Until 1864, slavery was authorized by the state constitution. Until the Fifteenth Amendment to the United States Constitution was ratified in 1870, African-Americans were denied the right to vote under the state constitution. Maryland failed to ratify this Amendment.
>
> Legal segregation affected African-Americans in many aspects of daily life in the early 1900s. During this period, laws which made property ownership a prerequisite to voting were enacted in the County. The judicially noticed facts also show a history of official resistance to desegregation in Worcester County. It did not fully desegregate its schools after

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[2] The District Court also held that Respondents had satisfied the second and third *Gingles* preconditions by proving that the minority community was politically cohesive and that white bloc voting was legally significant. In making the latter determination, the Court noted that "no African-American has won a county office in a county-wide head-to-head contest against a white candidate" and that the residency district requirement aggravated "the political disadvantage of the County's minorities." App. 30a.

> the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954).

App. 31a. The District Court's analysis of the "totality of circumstances" did not include any evaluation of the current impact or detrimental effect of such past history upon minority access to, and participation in, the political process. Based on this review of the "totality of circumstances," the District Court concluded that the election of five County Board members at-large, four of them from residency districts, violated § 2 of the Voting Rights Act. App. 31a. The District Court, however, did not consider whether Bill 93-6 violated § 2. As the Fourth Circuit stated, "the district court failed to rule on the legality of . . . Bill 93-6—the electoral system in effect at the time the matter was pending before the court." App. 15a.

D. The District Court's Remedy Opinion

Having found liability, the District Court ordered the parties to propose remedies. The Board submitted Bill 93-6, and Respondents offered two plans, one a single-member district plan containing a majority-minority district and one an at-large plan eliminating residency districts and establishing a cumulative voting system. The District Court found that the Board had not expressed a preference between the two plans submitted by Respondents and ordered the cumulative voting system to be implemented. Despite recognizing the obligation to defer to the legislative judgments of the Board to the extent possible consistent with § 2, the District Court nonetheless ignored the Board's preference for a residency system that ensured that all Board members would be knowledgeable of and responsive to the diverse interests of the various regions of Worcester County. App. 37a-42a. The District Court entered its order and judgment mandating a cumulative voting system remedy on April 4, 1994.

E. The Fourth Circuit's Opinion

On September 16, 1994, the Fourth Circuit reversed on the issue of remedy because the District Court had not

given adequate deference to the Board's preference for residency districts. The panel remanded the case to the District Court with instructions to afford Petitioners an opportunity to submit a proposed remedial plan of their choosing. App. 15a.

With respect to the issue of liability, however, the panel affirmed the District Court, without discussing the District Court's limited description of the totality of circumstances. In a footnote, the panel discussed the District Court's conclusions regarding the compactness of Respondents' proposed majority-minority district. Specifically, the panel acknowledged the Supreme Court's holding in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), *on remand sub nom. Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994), *appeal pending*, No. 94-923, United States Supreme Court, that race-conscious redistricting "constitutes impermissible race discrimination only when 'traditional districting principles' are ignored and the resulting districts are so geographically bizarre that they are explainable only as an act of racial segregation." App. 10a n.6. The panel held, however, that Respondents' proposed district satisfied *Shaw*. The panel reasoned that:

1. the shape of Respondents' proposed district "is not geographically bizarre" but rather "is similar in appearance to one of the former residency districts under Bill 93-6 and the County's prior electoral scheme";

2. the mere division of municipalities within the proposed majority-minority district did not constitute a failure to comply with traditional districting principles;

3. Respondents' proposed district "adhered to other traditional districting principles such as the historical north-south division of the County and the natural boundaries created by County waterways"; and

4. the citizens within Respondents' proposed district "shared common socioeconomic and political concerns." App. 10a-11a n.6.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S DECISIONS IN *SHAW* AND *GINGLES*, AS WELL AS WITH DECISIONS OF OTHER LOWER COURTS

The decisions of the District Court and the Fourth Circuit are in direct conflict with this Court's decisions in *Shaw* and *Gingles*, and are also in conflict with decisions of several three-judge courts interpreting *Shaw*, appeals from which are currently pending in this Court. These conflicts warrant the granting of this Petition.

A. The Decisions By The Courts Below Regarding Direct Evidence Of Racial Gerrymandering Conflict With This Court's Decision In *Shaw*

The District Court's decision relied on Respondents' evidence that it was possible to draw a geographically compact single-member district in Worcester County with a black majority by linking together black population concentrations in three non-contiguous municipalities. Respondents did not dispute, however, that to achieve this result they intentionally segregated voters by race. Indeed, Respondents excluded all considerations other than race in drawing this proposed district. Respondents' expert readily admitted as much in his trial testimony:

> Q Mr. Cooper, in terms of how you prepared the map that contains or displays [the proposed majority-minority district], would it be fair to say that what you have done is, you have linked together the black population concentrations in these three noncontiguous communities in order to segregate black citizens into a separate district, wherein they will have a majority of the voting age population? Isn't that what you've done?
>
> A [By Mr. Cooper] Well, obviously, that's what we've done.

App. 48a.

Notwithstanding this direct evidence of racial purpose, the District Court refused to acknowledge that this consciously segregated and racially designated proposed district violates *Shaw,* which prohibits the intentional use of race in drawing districts, without regard for traditional districting principles, unless the district is narrowly tailored to serve a compelling governmental interest. As this Court explained:

> A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.

Shaw, 113 S. Ct. at 2827. This Court further made clear in *Shaw* that among the vices of intentionally segregating districts by race is that:

> elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Id. The *Shaw* Court also recognized that *even* when done for "remedial purposes," intentional racial gerrymandering

> may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.

Id. at 2832.

What the District Court did here was precisely what *Shaw* prohibits. The District Court acknowledged the "dispersal" of the black population within the County, App. 22a, but nonetheless held the County liable based on a plan that "include[d] in one district individuals who belong[ed] to the same race, but who [were] otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin." *Shaw*, 113 S. Ct. at 2827. In derogation of the County's longstanding policy of having each Board member represent all people in the County, Respondents' plan was "created solely to effectuate the perceived common interests of one racial group." *Id.* Such a plan poses the "particular danger[]" of "balkaniz-[ing] us into competing racial factions." *Id.* at 2832.

In short, because the courts below based their liability holdings on a plan that violates *Shaw*, this Court should review the decisions below.[3]

B. The Decisions By The Courts Below Regarding Bizarrely-Shaped Districts Conflict With This Court's Decision In *Shaw* And Its Progeny

Even apart from Respondents' admission that their proposed district intentionally segregated voters by race, its bizarre shape should have triggered strict scrutiny under *Shaw* and the cases following it. *Shaw* makes clear that the Equal Protection Clause is violated by a district that

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[3] The decisions below also contrast sharply with what the three-judge court did in *Hays v. Louisiana*, 839 F. Supp. 1188, 1199-1204 (W.D. La. 1993), *vacated and remanded*, 62 U.S.L.W. 3859, No. 93-5194, *further proceedings on remand*, C.A. No. 92-1522 (W.D. La. 1994), *stayed pending appeal*, 115 S. Ct. 31 (1994), *appeal pending*, No. 94-627, United States Supreme Court, which held that such direct evidence of racial segregation as was presented here, by itself, demonstrated a constitutional violation. At the very least, the tension between the decisions here and the decision in *Hays* demonstrates that this Court's guidance on the proper interpretation of *Shaw* is necessary.

is "so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification." 113 S. Ct. at 2824. Where a district is so shaped, a court "must determine whether [it] is narrowly tailored to further a compelling governmental interest." *Id.* at 2832. Applying these principles, three-judge courts have recently struck down bizarrely-shaped districts in Louisiana, Georgia, and Texas. *See Hays v. Louisiana, supra*, note 3; *Johnson v. Miller*, No. 194-008, 1994 U.S. Dist. LEXIS 13043 (S.D. Ga. Sept. 12, 1994) (per curiam), *appeal pending*, Nos. 94-631 and 94-797, United States Supreme Court; *Vera v. Richards*, No. H-94-0277, 1994 U.S. Dist. LEXIS 12368 (S.D. Tex. Aug. 17, 1994), *stay granted*, 1994 U.S. Dist. LEXIS 12334 (1994), *appeal pending*, Nos. 94-805 and 94-806, United States Supreme Court.

Here, the result of Respondents' focus on race was an oddly-shaped district that snakes across Worcester County, stretching from its northern to its southern end, extracting the black citizens from numerous municipalities and communities in order to create a majority-minority district. The courts below nonetheless concluded that the district was geographically compact. The District Court reasoned that although Respondents' proposed districts "may not be symmetrical, . . . they are compact." App. 22a. The District Court further explained that Respondents' proposed district did not use " 'tentacle-like corridors,' " nor were its lines "so unreasonably irregular, bizarre or uncouth as to approach obvious gerrymandering." App. 22a.

In fact, the proposed majority-minority district bears a striking resemblance to those invalidated in *Vera*, *Johnson*, and *Hays*.[4] At points, the district is only a few

[4] Maps of the districts at issue in *Vera*, *Johnson*, *Hays*, and *Jeffers v. Tucker*, 847 F. Supp. 655 (E.D. Ark. 1994), as well as maps of Respondents' proposed district, are being lodged separately with this Court.

miles wide. Its bizarre shape is characterized by two prongs at its southern end that look more like a crocodile's mouth than a rational compact district. One look at the map of this proposed district reveals fingerlike extensions that had the purpose and effect of segregating Worcester County's white and African-American populations. Indeed, a comparison of the map of Respondents' proposed district with the maps of the districts struck down in *Hays, Vera,* and *Johnson* demonstrates that the lower courts are hopelessly in conflict over the proper role of district shape in cases decided under *Shaw*.

C. The Decisions By The Courts Below Conflict With This Court's Decision In *Gingles*

As noted above, *Gingles* held that one of the requirements for a § 2 claim is that minority plaintiffs must be sufficiently numerous and geographically compact to constitute a voting age population majority in a single-member district. 478 U.S. at 50. Although *Shaw* rests on the Fourteenth Amendment and not § 2, the compactness requirement of *Shaw* is essentially the same as that set forth in *Gingles*.[5] For the same reasons, therefore, that the proposed district violates *Shaw,* it violates *Gingles*. Indeed, in *Jeffers v. Tucker,* 847 F. Supp. 655 (E.D. Ark. 1994), the three-judge court, unlike the courts below in the present case, rejected a § 2 challenge and refused to require the drawing of non-compact districts. The court reasoned, "the peculiar shape of [the Plaintiffs' proposed] districts . . . is precisely due to the lack of the compact minority population required by *Gingles*." *Id.* at 662. This conflict likewise merits review by this Court.

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[5] *See Vera v. Richards,* 1994 U.S. Dist. LEXIS 12368 at *129 n.54.

D. The Justifications Proffered By The Courts Below For The Bizzare Shape Of Respondents' Proposed District Contravene The Requirements Of *Shaw* and *Voinovich v. Quilter*

As noted above, *Shaw* requires that a bizarrely-shaped district be narrowly tailored to serve a compelling governmental interest. 113 S. Ct. at 2832. Rather than evaluating the proposed district under the *Shaw* standard, the District Court rationalized its conclusion regarding the compactness of Respondents' proposed district by stating that its shape was "unavoidable because of the heavy white population and the need to achieve a majority African-American population in one of the districts." App. 22a. The District Court's reasoning was circular. It concluded that there was a "need" for a district with an African-American majority population. *Id.* That "need" was used to justify the holding of § 2 liability. The conclusion of liability in turn became the basis for holding that the Court needed to remedy the § 2 violation. This reasoning contravenes the express holding of this Court in *Voinovich v. Quilter,* 113 S. Ct. 1149, 1156 (1993), that "federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law." *See also Growe v. Emison,* 113 S. Ct. 1075, 1084 (1993) (unless *Gingles* preconditions are established, "there neither has been a wrong nor can be a remedy").

The Court of Appeals' rationale regarding compactness fares no better. The panel attempted to rationalize its conclusion regarding compactness by stating that Respondents' proposed district is "similar in appearance to one of the former residency districts under Bill 93-6 and the County's prior electoral scheme." App. 11a n.6.[6] It

[6] The United States has used the quoted language in an effort to justify bizarrely-shaped districts in other cases. Jurisdictional Statement of the United States of America, in *United States of America v. Hays,* No. 94-558, filed September 26, 1994, at 13 ("[T]he manner in which the State has drawn . . . other districts is a proper

appears that the panel was comparing the proposed majority-minority district with District 4, which includes Assateague Island. The shape of District 4 is, of course, dictated by the boundaries of this island, which is a largely uninhabited barrier island that forms the eastern border of Worcester County. Thus, the boundaries of District 4, unlike those of Respondents' proposed district, are compelled by racially neutral, geographical considerations.

The panel likewise erred in characterizing the County's objection to the proposed plan as being based on its division of municipalities. App. 10a n.6. The division of municipalities was only one of several major departures from traditional districting principles evident from the proposed majority-minority district. It also bisected five election districts and divided established communities of interest predicated upon socioeconomic, recreational, regional, educational, historical, and political characteristics unrelated to race. App. 52a-57a.[7]

Nor, contrary to the panel's opinion, did Respondents' proposed district "adhere[] to other traditional districting principles such as the historical north-south division of the County." App. 10a-11a n.6. Again, a glance at the

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benchmark for determining whether a particular majority-minority district is 'bizarre.' A bizarre district is one that reflects an extraordinary departure from a State's usual districting practices. See *Cane v. Worcester County, Maryland*, No. 94-1579 (4th Cir. Sept. 16, 1994) . . . .").

[7] In holding that the division of municipalities in Respondents' proposed district complied with *Shaw*, the panel erroneously relied on *Clark v. Calhoun County, Mississippi*, 21 F.3d 92, 96 (5th Cir. 1994), because it thought that the Fifth Circuit had held there that a proposed majority-minority district that divided municipalities nonetheless complied with traditional districting principles. The Fifth Circuit, however, did not reach such a conclusion. Instead, it simply remanded a district court's holding that a majority-minority district was not compact under *Gingles* because the district court had not made adequate factual findings to support its conclusion. *Id.* at 96-97.

map demonstrates that, far from respecting the County's traditional north-south division, Respondents' proposed district disregards it, stringing together communities from the northeastern to the southwestern regions of the County.

E. The Decisions Of The Courts Below Conflict With Those Of Other Courts Regarding The Propriety Of Racially Defined "Communities Of Interest"

The panel erred as a matter of law when it stated that "uncontradicted evidence before the district court revealed that the citizens within the proposed majority African-American district shared common socioeconomic and political concerns." App. 11a n.6. On the contrary, the only characteristics that defined a community of interest within Respondents' proposed district were grounded in race (*see* Brief of Appellees, No. 94-1579, at 14). Indeed, the District Court admitted that "[t]he plan merely affirms the existing racial divisions in the County." App. 22a. As this Court has recognized, however, such a racially defined district "bears an uncomfortable resemblance to political apartheid." *Shaw,* 113 S. Ct. at 2827.[8] *See also Burton v. Sheheen,* 793 F. Supp. 1329, 1357 (D.S.C. 1992) ("the color of one's skin, in and of itself, does not create a community of interest"), *vacated on other grounds sub nom. Statewide Reapportionment Advisory Comm. v. Theodore,* 113 S. Ct. 2954 (1993). Other three-judge courts have similarly concluded that race cannot constitute a community of interest in and of itself. *See Johnson v. Miller,* 1994 U.S. Dist. LEXIS 13043 at *61-*62:

> The problem with this tack is that, while partially convincing, such a community of interest is barred

[8] As Justice Douglas observed, such racial line drawing causes "the multiracial . . . communities that our Constitution seeks to weld together as one [to] become separatist." *Wright v. Rockefeller,* 376 U.S. 52, 67 (1964) (Douglas, J., dissenting).

> from constitutional recognition. To urge this racial identification as a justification for the shape of the Eleventh District is tantamount to simply admitting that race was the overriding consideration in its creation. . . . A voting district . . . that is configured to cater to these "black" concerns is simply a race-based voting district. It is based on superficial, racially founded generalizations about what matters to black Georgians. That is, it trafficks in racial stereotypes.

Likewise, in *Vera v. Richards,* 1994 U.S. Dist. LEXIS 12368 at *113, the three-judge court rejected the argument that:

> there is a community of interest among African-American voters which should be regarded as a legitimate criterion for legislative districting. Even if this argument would support the decision of the Legislature to take African-American voters' group interests into account in the same way that it does the interest of other voters, e.g., suburbanites, city-dwellers, retirees, the argument cannot go too far. Because a large part of this argument is based upon similarities grounded in race, it is particularly vulnerable to the Fourteenth Amendment's proscription of racial classification in our society. Further, the intervenors' argument will not support the creation of districts that have no basis in traditional neutral districting criteria. To permit such districts would fly in the face of *Shaw*.

Here, as in *Johnson v. Miller* and *Vera v. Richards*, Respondents asked the court to approve district boundaries that were based on a racial community of interest. Unlike the courts in *Johnson* and *Vera*, however, the courts below concluded that such a community of interest could justify a geographically non-compact majority-minority district. In so holding, the courts below erred as a matter of law. This conflict between the lower courts' opinions here and the opinions in *Johnson*, *Vera*, and,

most important, *Shaw* regarding the issue of whether a community of interest can be based on race likewise warrants review by this Court.

II. THE DECISIONS BELOW PRESENT AN ISSUE OF OVERRIDING NATIONAL IMPORTANCE

The courts below felt compelled to hold the first *Gingles* precondition was satisfied by a non-compact, racially defined district. As shown above, this decision conflicts with *Shaw*, and it highlights the need for this Court's guidance on how to apply *Gingles* consistently with *Shaw*. The courts increasingly are faced with what some view as a currently irreconcilable tension between *Gingles*, which some have interpreted as mandating the intentional creation of majority-minority districts, and *Shaw*, which prohibits the intentional segregation of voters into such districts based on their race, absent a compelling governmental interest and narrow tailoring. As the State of Georgia, *et al.* noted in *Miller v. Johnson*, United States Supreme Court No. 94-631:

> [W]e are moving close to a legal environment where, on the one hand, the Voting Rights Act imposes certain mandates, *Thornburg v. Gingles*, 478 U.S. 30 (1986), but the Fourteenth Amendment prohibits the State from going too far in that direction. *Shaw v. Reno, supra.*[9]

All of the cases discussed above demonstrate that the issue posed by the decisions below is presently in litigation in all parts of this country, from the west coast to the deep south to the Atlantic states. These cases demonstrate not only the importance of this issue but the frequency with which it arises in the federal courts. The courts are clearly divided on the meaning and application of *Gingles*' "geographical compactness" requirement, and the extent to which race-based districts can depart from traditional districting principles.

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[9] Jurisdictional Statement of State of Georgia, *et al.*, at 15.

In particular, the lower courts' decisions demonstrate that the proper application of *Shaw* has become an issue not simply in congressional redistricting, but also in state and local government redistricting. In addition to the federal government and the fifty state governments, there were 84,955 units of local government as of January 1992. Of these, 3,043 were county governments and 19,279 were municipal governments. The remainder consisted of 16,656 town or township governments, 14,422 school district governments, and 31,555 special district governments and other special purpose local government districts. U.S. Bureau of the Census, *1992 Census of Governments*, Vol. 1, Government Organization, No. 1 (March 1994), at v.[10] Given these numbers, the issues presented by these conflicting lower court decisions will clearly continue to arise repeatedly unless the Court provides guidance now.

III. THE DECISIONS BELOW CONFLICT WITH THIS COURT'S DECISION IN *DEGRANDY* AND THE FIFTH CIRCUIT'S DECISION IN *WESTWEGO*

The decisions of the District Court and the Court of Appeals are in direct conflict with this Court's decision in *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994), in which this Court held that mere establishment of the *Gingles* preconditions will not suffice to prove a § 2 vote dilution claim, and that a district court is required to rest its ultimate conclusions about equality or inequality of opportunity upon "comprehensive, not limited, canvassing of relevant facts." *Id.* at 2657. The courts below did not adequately consider the "totality of circumstances," as required by the words of § 2 itself, 42 U.S.C. § 1973(b), and failed to make the necessary findings of fact regarding them.

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[10] *See* Justice Clarence Thomas' concurring opinion in *Holder v. Hall*, 114 S. Ct. 2581, 2595 (1994), noting that over 60% of American cities use at-large election systems for their governing bodies.

These circumstances include the factors identified in the legislative history of § 2, such as discriminatory slating of candidates, racial campaign appeals, and lingering socioeconomic disparities between minorities and others. *Gingles*, 478 U.S. at 50-53. While lack of electoral success is also a factor that may be evidence of vote dilution, "courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes." *Johnson v. DeGrandy*, 114 S. Ct. at 2657.[11]

In *DeGrandy*, the District Court found that the three *Gingles* preconditions were satisfied and that the minorities in that case had suffered historically from official discrimination and continued to feel the social, economic, and political effects of such discrimination, but the Supreme Court made it clear that more was required. The District Court was required to examine other evidence in the "totality of circumstances," including the extent of the opportunities minority voters enjoyed to participate in the political process, and its conclusion regarding the lack of equal electoral opportunity was required to be "addressed explicitly, and without isolating any other arguably relevant facts from the act of judgment." 114 S. Ct. at 2657.

The District Court in the instant case concluded, just as the District Court did in *DeGrandy*, that once the

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[11] *See also Chisom v. Roemer*, 501 U.S. 380, 397 (1991) (§ 2 requires minority claimants to prove that they "have less opportunity than others 'to participate in the political process *and* to elect representatives of their choice' ") (quoting 42 U.S.C. § 1973); *Ortiz v. City of Philadelphia*, 28 F.3d 306, 312 (3d Cir. 1994) (plaintiffs must show causal connection between challenged practice and prohibited result); *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 867-68 (5th Cir. 1993) (plaintiffs must establish that "past discrimination has affected their ability to participate in the political process"), *cert. denied*, 114 S. Ct. 878 (1994).

Gingles preconditions were in its view established, little more than a cursory recitation of past discrimination, which included in this case a history of segregated school systems and the historical legacy of slavery, without elaboration as to the current effect or present impact of the totality of the circumstances on equal opportunity and access, was required in order to justify the conclusion of vote dilution under § 2. As the Court made clear in *DeGrandy*, more was required.

The Court of Appeals' conclusions regarding the adequacy of the District Court's findings are particularly serious errors under *DeGrandy*, in light of the fact that the Court of Appeals used the District Court's inadequate findings to invalidate not simply the existing electoral system, but also the Bill 93-6 system, which the District Court had not considered at all. *See* App. 15a ("[T]he district court failed to rule on the legality of the scheme set forth in Bill 93-6.").

Consistent with *DeGrandy*, *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201, 1203-04 (5th Cir. 1989), *rev'd after remand*, 906 F.2d 1042 (5th Cir. 1990), *rev'd and remanded*, 946 F.2d 1109 (5th Cir. 1991), which similarly involved a challenge to an at-large electoral system, requires a district court's findings in a § 2 vote dilution suit to be sufficiently specific and particularized to provide a basis for the judgment and for meaningful appellate review of the decision. *Westwego* requires a district court to take note of substantial contrary evidence, to specify on which evidence it relies in support of its conclusions, and to explain its reasoning with sufficient particularity. Here, the District Court failed to make specific and sufficiently particularized findings as to the totality of the circumstances and failed to undertake a searching practical evaluation of the past and present reality and political landscape of Worcester County, as required by *Westwego*. *See also Clark v. Calhoun County, Mississippi*, 21 F.3d 92 (5th Cir. 1994), holding that inadequate and insufficient particularized

findings of the District Court rendered its conclusion as to § 2 liability erroneous as a matter of law.

The Court should grant certiorari to provide guidance on the crucial aspect of voting rights law presented in this case.

CONCLUSION

For these reasons, and on the basis of the authorities cited, a Writ of Certiorari should issue to review the decision of the Court of Appeals in this case. Failing that, the Court should withhold its disposition of this Petition pending the Court's decisions in *Hays v. Louisiana, Johnson v. Miller*, and *Vera v. Richards*, which will likely shed light on further proceedings in this case.

Respectfully submitted,

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December 2, 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1579

HONISS W. CANE, JR.,
Plaintiff-Appellee,

v.

WORCESTER COUNTY, MARYLAND; GEORGE M. HURLEY; JOHN E. BLOXOM; REGINALD T. HANCOCK; FLOYD F. BASSETT; JEANNE LYNCH, Members, Worcester County Board of Commissioners,
Defendants-Appellants,

and

GEORGE H. DRYDEN; HINSON FINNEY; MARK FROSTROM,
Defendants.

WASHINGTON LEGAL FOUNDATION;
CENTER FOR VOTING AND DEMOCRACY;
UNITED STATES OF AMERICA,
Amici Curiae.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Joseph H. Young, Senior District Judge
(CA-92-3226-Y)

Argued: July 21, 1994

Decided: September 16, 1994

Before WILKINS and WILLIAMS, Circuit Judges, and ANDERSON, United States District Judge for the District of South Carolina, sitting by designation.

OPINION

WILKINS, Circuit Judge:

Honiss W. Cane, Jr. and others [1] brought this action on behalf of all African-American residents of Worcester County, Maryland (collectively "Plaintiffs"), claiming that the at-large system used to elect members of the County Board of Commissioners ("the Board") diluted the voting strength of African-Americans in violation of § 2 of the Voting Rights Act of 1965, as amended June 29, 1982.[2] *See* 42 U.S.C.A. § 1973 (West Supp. 1994) (Voting Rights Act). The district court found that the at-large electoral system violated §2 and ordered the County to implement a cumulative voting system within 60 days. The County appeals, arguing that the district court erred in finding that the electoral scheme violated § 2 and in adopting a cumulative voting plan as a remedy. We conclude that the findings of the district court regarding the § 2 violation are not clearly erroneous, but that the court abused its discretion by ordering the County to implement the cumulative voting scheme proposed by Plaintiffs. Therefore, we affirm in part, reverse in part, and remand for further proceedings.

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[1] The other named Plaintiffs include Fannie Birckhead, James L. Purnell, Sr., Saunders Marshall, Edward V. DeShields, William Waters, Gabriel L. Purnell, the Worcester County Voting Rights Coalition, and the Worcester County Branch of the NAACP.

[2] In addition to the County, Plaintiffs brought this action against the members of the Worcester County Board of Commissioners, George M. Hurley, John E. Bloxom, Reginald T. Hancock, Floyd F. Bassett, and Jeanne Lynch, as well as George H. Dryden, Hinson Finney, and Mark Frostrom—members of the Board of Supervisors of Elections for Worcester County.

I.

Worcester County is a predominantly rural county on the southeastern shore of Maryland bordering Delaware and Virginia. According to the 1990 Census, the County's total population is 35,028, of which 7,448 (or 21.26%) are African-American. The voting age population of the County is 27,331, of which 5,237 (or 19.16%) are African-American. The County's African-American population is concentrated in the communities of Pocomoke, Stockton, Snow Hill, and Berlin.

The Board is composed of five commissioners and serves as the legislative and executive body of the County. When this action was filed in November 1992, County law provided that the commissioners of the Board be elected at large under a residency district system. The County was divided into four residency districts, and four commissioners were required to reside in the residency district corresponding to the Board seat for which they were elected. The fifth member was a commissioner-at-large, who was required to be a resident of the County but was not required to reside in any particular district.

In May 1993, after this action was filed but before the first hearing was held, the Board passed Bill 93-6, which amended the voting scheme for electing commissioners to the Board. The revised plan maintained the at-large electoral scheme, but divided the County into five residency districts, eliminating the commissioner-at-large position and establishing a fifth designated post. The legislative findings accompanying Bill 93-6 indicate that the Board determined that a fifth population center had developed and that this change in population patterns warranted the creation of the fifth residency district.

After conducting a bench trial on the merits, the district court issued a memorandum opinion dated January 7, 1994, containing its findings of fact and conclusions of law. *Cane v. Worcester County, Md.*, 840 F. Supp. 1081

(D. Md. 1994). The district court concluded that the County's former electoral scheme violated § 2 of the Voting Rights Act and ordered the County to submit a remedial plan within 60 days. *Id.* at 1091. The County advised the district court that it believed that its then current plan, embodied in Bill 93-6, met all constitutional and statutory voting rights requirements.

Plaintiffs submitted two proposed remedial plans and moved for the district court to adopt one of them. The first plan proposed by Plaintiffs, Plan A, provided for a single-member district system composed of five districts with one of the five districts being a majority African-American district. Voters would cast one vote for a candidate running in the district in which they reside. The candidate receiving the most votes in each of the five districts would be declared the winner.[3] The second plan, Plan B, proposed a cumulative voting system pursuant to which all candidates would run in a countywide at-large election. Each voter would be allowed to cast five votes and to allocate all of them to one candidate or divide them among several candidates. The five candidates receiving the most votes among all of those offering for election would win a seat on the Board.[4]

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[3] The district court summarized Plan A as follows:

> A single-member district arrangement with one black majority district. . . . Under this Plan, the candidates for the five-member Board must be residents of the district from which they seek election, and only those voters who reside within the district are eligible to vote for candidates seeking election from that district. The candidate who receives the most votes in each district is elected to the Commission.

Cane v. Worcester County, Md., 847 F. Supp. 369, 371 n.3 (D. Md. 1994).

[4] The text of Plan B provides:

> A cumulative voting plan—an at-large election system in which five Commissioners are elected by all registered voters within the County. Each voter may cast up to five votes in Commission elections, and may cumulate his or her votes for one or

The district court concluded that the County's current plan, embodied in Bill 93-6, was legally unacceptable because it failed to remedy the established § 2 violation. *Cane v. Worcester County, Md.*, 847 F. Supp. 369, 371-72 (D. Md. 1994). Relying on the County's preference for an at-large electoral scheme expressed in the legislative findings of Bill 93-6, the court then ordered the County to implement Plan B, the cumulative voting scheme proposed by Plaintiffs. *Id.* at 373-74.[5]

II.

Section 2 of the Voting Rights Act prohibits any "qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C.A. § 1973(a). A denial or abridgement of the right to vote in violation of § 2 is established when:

> [B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office

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more chosen candidates. Winning candidates are the top five vote-getters of all Commission candidates vying for office, elected by a simple plurality of votes. The cumulative voting plan applies both to primary elections and general elections for Worcester County Commission.

[5] While the opinion of the district court is not clear regarding the treatment of the residency districts, the parties agreed at oral argument that the residency districts were abolished under the cumulative voting plan imposed by the district court.

> in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C.A. § 1973(b).

In order to prove that the use of a multimember district dilutes their votes in violation of § 2, members of a protected minority group must establish three "necessary preconditions." *Thornburg v. Gingles,* 478 U.S. 30, 50-51 (1986). "First, the minority group must be . . . sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50. "Second, the minority group must be . . . politically cohesive." *Id.* at 51. And third, the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.*

Once the three preconditions set forth in *Gingles* are established, the trier of fact must determine whether, based on a totality of circumstances, the use of a multimember district violates § 2. *See Johnson v. De Grandy,* 114 S. Ct. 2647, 2657 (1994). The essence of this inquiry is whether the "electoral . . . structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and [majority] voters to elect their preferred representatives." *Gingles,* 478 U.S. at 47. Factors relevant to the analysis include, but are not limited to: (1) a history in the state or political subdivision of official voting-related discrimination against the minority group; (2) the extent of racial polarization in the elections of the state or political subdivision; (3) the extent to which the state or political subdivision has used voting practices or procedures that enhanced the opportunity for discrimination against the minority group; (4) the exclusion of minority group members from the candidate slating processes; (5) the extent to which past discrimination in areas such as education, employment, and health

hinder the ability of members of the minority group to participate effectively in the political processes; (6) the use of racial appeals in political campaigns; (7) the extent to which minority group members have been elected to public office in the relevant jurisdiction; (8) whether elected officials exhibit a significant lack of responsiveness to the particularized needs of minority group members; and (9) whether the policies offered to justify the challenged voting practice are tenuous. *Id.* at 44-45 (citing S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07). While each of these factors may be probative, no single factor or combination of factors is dispositive. *Id.* at 45. The ultimate finding of a district court that based on the totality of the circumstances an election scheme dilutes minority voters' ability to participate in the political process and to elect representatives of their choice in violation of § 2 is a factual finding subject to a clearly erroneous standard of review. *Id.* at 78-79.

A.

In its analysis of the first *Gingles* precondition, the district court reviewed two alternative single-member district plans submitted by Plaintiffs. *Cane,* 840 F. Supp. at 1086. It noted that because the African-American population was spread across several different regions of the County, the construction of a majority African-American district would necessarily entail the running of commissioner district lines across election districts and through at least two municipalities. *See id.* at 1086-87. However, the court determined that it was possible to construct a majority African-American district that was "not unreasonably irregular in shape" because the African-American population was concentrated in several small pockets. *Id.* at 1086. Noting that the first plan submitted by Plaintiffs did "not rely on districts that run through several 'tentacle-like corridors' nor [we]re the district[s'] boundary lines so unreasonably irregular, bizarre or uncouth as to approach obvious

gerrymandering," the district court specifically found that although the resulting districts were not symmetrical, they were compact. *Id.* at 1087. In sum, the district court found that the African-American voters of Worcester County were a sufficiently large and geographically compact group to create a majority African-American district under a single-member district voting scheme.

With respect to the second *Gingles* precondition, the district court first noted that the two statistical methods used by the parties' experts to evaluate voting behavior in Worcester County failed to produce reliable statistical evidence because of the lack of available data and a truncated analysis caused by the small number of districts and lack of a majority African-American district. *Id.* at 1087-88. The court then proceeded to review the results of both endogenous and exogenous elections, concluding that African-Americans exhibited a significant degree of political cohesion when consideration was given to the race, political party, and experience of individual candidates. *See id.* at 1087-89. Further, the evidence showed that in towns in Worcester County that had converted from an at-large to a single-member district electoral system, an African-American was elected to the town councils from the newly created majority African-American districts. *Id.* at 1088. Finally, the court noted that the African-American population in the County is politically active, providing substantial support to the local chapter of the NAACP and causes of interest to the African-American community. *Id.* at 1089. Based on this evidence, the district court found that African-Americans in Worcester County are politically cohesive. *Id.*

In its analysis of the third and final *Gingles* precondition, the district court first reviewed the results of the two County commissioner elections in which the minority-preferred candidate was an African-American. *Id.* In each of these elections, the minority-preferred candidate received only a small percentage of the white vote. *Id.* A

review of exogenous elections demonstrated similar voting patterns: The minority-preferred candidates in both national and local elections generally received a small percentage of the vote from white voters in Worcester County. *Id.* at 1089-90.

The court concluded that this evidence of white bloc voting was legally significant due to the structure of the scheme for electing commissioners to the Board. *Id.* at 1090. Under the at-large residency district system, minority candidates were required to run one-on-one, countywide against individual white candidates. Even taking into consideration the white crossover vote, which averaged 19 percent, the court found that the at-large electoral system debased the value of African-American political strength because the combined African-American and white-crossover vote would be unable to elect an African-American candidate. This conclusion was supported by evidence that in the history of Worcester County an African-American candidate has never won a countywide, head-to-head contest against a white candidate. *Id.*

Once it found that the three *Gingles* preconditions were satisfied, the district court reviewed other factors in determining whether, under a totality of circumstances, the system of electing commissioners to the Board violated § 2. *Id.* at 1090-91. The court specifically noted that African-Americans were denied the right to vote in Maryland until 1870 and that in the early 1900s the State employed voting prerequisites that enhanced the opportunity for discrimination against African-Americans. *Id.* at 1091. Taking into consideration these factors and those discussed above, the court concluded that "under the totality of the circumstances, the current system for election to the Worcester County Commission interacts with past and present discrimination to deprive African-Americans of Worcester County the same 'opportunity [as] other members of the electorate to participate in the political process and to elect representatives of their

choice.'" *Id.* (alteration in original) (quoting 42 U.S.C.A. § 1973(b)).

B.

Having carefully reviewed the record, we are unable to conclude that the district court was clearly erroneous in finding that the use of an at-large residency district system for electing commissioners to the Board impermissibly diluted the votes of African-Americans.[6] Accord-

[6] With respect to the finding of a § 2 violation by the district court, the County principally contends that Plaintiffs have failed to satisfy the first *Gingles* precondition of geographical compactness because the creation of a single-member majority African-American district would require district lines to be drawn solely on the basis of race—a practice condemned by the Supreme Court in *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (1993), as "altogether antithetical to our system of representative democracy." However, the Court in *Shaw* upheld the intentional use of race in the redistricting process, recognizing that "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Id.* at 2826. The Court concluded that race consciousness in the redistricting process constitutes impermissible race discrimination only when "traditional districting principles" are ignored and the resulting districts are so geographically bizarre that they are explainable only as an act of racial segregation. *Id.* at 2827-30.

The County asserts that the creation of a majority African-American district would ignore traditional districting principles because it would require the division of at least two municipalities. However, simply because district lines may be drawn "to maintain the integrity of political subdivisions," *id.* at 2826, does not mean that a proposed majority-minority district that would divide municipalities fails to comply with traditional districting principles, *see Clark v. Calhoun County, Miss.*, 21 F.3d 92, 96 (5th Cir. 1994) (concluding that plaintiffs had not necessarily failed to prove the first *Gingles* precondition of geographical compactness solely because the creation of a majority-minority district would require the division of three separate municipalities). The undisputed evidence indicated that the single-member district plans proposed by Plaintiffs adhered to other traditional districting principles such

ingly, we affirm its conclusion that the former electoral scheme violated § 2 of the Voting Rights Act.

III.

Once a violation of § 2 of the Voting Rights Act has been established, a district court should give the appropriate legislative body the first opportunity to devise a remedial plan. *McGhee v. Granville County, N.C.*, 860 F.2d 110, 115 (4th Cir. 1988). The ensuing review by and the remedial powers of the district court are largely dictated by the action taken by the legislative body. *Id.* When the legislative body responds with a proposed remedy, the "court may not thereupon simply substitute its judgment of a more equitable remedy for that of the legislative body; it may only consider whether the proffered remedial plan is legally unacceptable." *Id.* If the proposed remedial plan is legally acceptable, then the district court must "accord great deference to legislative judgments about the dynamics of an overall electoral posed remedy, reflecting as it will a variety of political judgments about the dynamics of an overall electoral process that rightly pertain to the legislative prerogative of the state and its subdivisions." *Id.* "If the legislative body fails to respond or responds with a legally unacceptable remedy, the responsibility falls on the District

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as the historical north-south division of the County and the natural boundaries created by County waterways. In addition, the uncontradicted evidence before the district court revealed that the citizens within the proposed majority African-American district shared common socioeconomic and political concerns. *See Shaw*, 113 S. Ct. at 2827. Drawing districts based on such common interests is perhaps one of the most often invoked districting principles. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973). Finally, the shape of the proposed majority African-American district is not geographically bizarre. Rather, it is similar in appearance to one of the former residency districts under Bill 93-6 and the County's prior electoral scheme. Thus, we find meritless the the County's assertion that the geographical compactness finding of the district court violates the dictates of *Shaw*.

Court to exercise its discretion in fashioning a near optimal plan." *Id.* (citations and internal quotation marks omitted).

A.

The County asserts that the district court erred in concluding that Bill 93-6 was a legally unacceptable plan. A proposed plan is a legally unacceptable remedy if "it violates . . . constitutional or statutory voting rights—that is, [if] it fails to meet the same standards applicable to an original challenge of" an electoral scheme. *Id.* Bill 93-6 altered the former electoral scheme by eliminating the commissioner-at-large position and creating a fifth residency district. Each of the five commissioners of the Board were still elected at-large. This amendment of the County's electoral scheme did not remedy the system's dilution-by-submergence effect because it retained at-large voting—the structural cause of the vote dilution. As conceded by the County at oral argument, minority-preferred candidates are no more likely to win a seat on the Board under the scheme established by Bill 93-6 than they were under the former electoral scheme. Bill 93-6 is not a legally acceptable remedy and the district court properly rejected it.

B.

With respect to the remedy imposed by the district court, the County principally argues that cumulative voting is a radical departure from traditional elections systems, and thus, it may not be judicially imposed to remedy a § 2 violation. Justice Thomas recently suggested that "nothing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under § 2." *Holder v. Hall,* 114 S. Ct. 2581, 2601 (1994) (Thomas, J., dissenting). We are not called upon to outline whether facts and circumstances might justify the imposition of a cumulative voting plan on a political subdivision. Our

review is limited by the specific facts and circumstances presented here, and under them, the district court abused its discretion in adopting the cumulative voting scheme proposed by Plaintiffs.

As noted above, we stated in *McGhee* that if the remedial plan proposed by the appropriate legislative body is legally acceptable, the district court must "accord great deference to legislative judgments about the exact nature and scope of the proposed remedy." 860 F.2d at 115. Because the plan proposed by the County in *McGhee* was legally acceptable, we did not reach the issue of the degree of deference the court must accord legislative judgments in exercising its discretion to fashion a remedy when the legislative body fails to propose a remedy or its proposed remedy is legally unacceptable. We are confronted with that issue here and conclude that even when the legislative body fails to offer a remedy or its proposed remedy is legally unacceptable, the court, in exercising its discretion to fashion a remedy that complies with § 2, must to the greatest extent possible give effect to the legislative policy judgments underlying the current electoral scheme or the legally unacceptable remedy offered by the legislative body. *See White v. Weiser,* 412 U.S. 783, 793-96 (1973) (holding that the district court, after properly rejecting the reapportionment plan adopted by the legislature, erred in ignoring legislative districting policy and failing to implement a reapportionment plan "which most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements"); *see also Whitcomb v. Chavis,* 403 U.S. 124, 160-61 (1971) (holding that the district court erred in fashioning a plan that rejected state policy choices more than was necessary to remedy the specific constitutional violations involved).

In reviewing the two plans submitted by Plaintiffs, the district court recognized its obligation "to give great deference to legislative judgments about the nature and scope of the proposed remedy and to reconcile the re-

quirements of the statute with the goals of county political policy." *Cane,* 847 F. Supp. at 372-73 (citations omitted). The court provided two justifications for its selection of Plan B, the cumulative voting plan. First, it concluded that permitting all of the citizens to vote for all of the candidates would promote the County's desire to have commissioners serve the collective interest of the County by requiring the candidates to appeal to all of the voters in the County. *Id.* at 373. Second, it noted that Plan B would avoid the creation of districts that split or combined municipalities. *Id.*

However, the district court failed to give due deference to another legislative judgment set forth in the record. The County clearly expressed a preference for residency requirements that would ensure that the Board members were knowledgeable of and responsive to the diverse interests of the various regions of the County. The legislative findings accompanying Bill 93-6 provided that "[t]he Maryland General Assembly has recognized the desirability of, and Worcester County has for almost two centuries been well served by, having the governing body of the County representative of the distinct southern, central, and northern areas of the County." Since 1798, the County government has been structured to allow the members of the County's governing body to "be disbursed as equally as may be throughout the County." In amending the district system to add a fifth residency district the Board explained that:

> The best interests of the citizens in each of the different areas of the County can be best served by . . . retaining the existing four commissioner residence districts with the creation of a new fifth commissioner residence district from a portion of the existing Commissioner District No. 3 so that there shall be one Commissioner from each of the population centers, or surrounding area, who shall be familiar with and knowledgeable of the people, conditions,

needs and concerns of that particular section of the County.

In adopting the cumulative voting plan set forth in Plan B, the district court failed to defer to this expressed legislative preference. It abolished the residency districts, imposing a plan that would permit all five seats on the Board to be filled by individuals living in the same general area of the County. In sum, it failed to adequately defer to the "variety of political judgments about the dynamics of [the] overall electoral process that rightly pertain to the legislative prerogative of" the County. *McGhee*, 860 F.2d at 115.

IV.

When a political subdivision fails to submit a legally acceptable proposed remedy, the appropriate course for the district court to follow is to fashion a remedy that complies with § 2 and effectuates to the greatest extent possible the policy judgments expressed by the County. However, here the district court failed to rule on the legality of the scheme set forth in Bill 93-6—the electoral system in effect at the time the matter was pending before the court. Therefore, the County was not advised that its current electoral system, Bill 93-6, violated § 2 when it was directed to submit a proposed remedy.[7] For this reason, we conclude that the proper course of action is to remand to the district court with instructions to afford the County an opportunity to submit a proposed plan of its choosing that remedies the § 2 violation.[8]

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[7] As we noted above, Bill 93-6 and the County's former electoral system are structurally identical for purposes of a § 2 analysis. Therefore, we need not remand the case to allow the district court to find in the first instance that Bill 93-6 violates § 2.

[8] At oral argument, the County expressed a strong preference for a single-member district plan, assuming the finding of a violation was upheld. It indicated that it had previously failed to express a preference between the two plans submitted by Plaintiffs

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED

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because it interpreted our decision in *Neal v. Harris*, 837 F.2d 632 (4th Cir. 1987), as holding that any such concession would constitute a binding admission on the issue of liability. Because the County will be faced with the prospect of submitting a remedial plan on remand, we note that *Harris* does not stand for the proposition assigned it by the County. *Harris* simply held that once a government enters a consent decree, expressly agreeing that the plaintiffs should be granted appropriate relief, it may not thereafter seek to avoid the immediate imposition of such relief by arguing that its current electoral system does not violate § 2 of the Voting Rights Act. *Id.* at 634.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. Y-92-3226

HONISS W. CANE, JR., *et al.*

v.

WORCESTER COUNTY, MARYLAND, *et al.*

YOUNG, Joseph H., Senior United States District Judge

Date: January 7, 1994

MEMORANDUM
OPINION

Honiss W. Cane, Jr., Fannie Birckhead, James L. Purnell, Sr. and Saunders Marshall ("plaintiffs") have sued Worcester County, Maryland, George M. Hurley, John E. Bloxom, Reginald T. Hancock, Floyd F. Basett and Jeanne Lynch ("defendants"), and the Worcester County Board of Commissioners ("Board"), alleging that the system for electing members to the Board violates § 2 of the Voting Rights Act by discriminating against African-American voters.

Worcester County Government

Worcester County is a predominantly rural county located in the southeastern part of Maryland. It borders the states of Delaware and Virginia as well as the Atlantic Ocean. The County contains four incorporated towns:

Berlin, Ocean City, Pocomoke and Snow Hill. According to the 1990 Census, Worcester County has an African-American population of 7,448 persons or 21.26% of the total population of 35,028 persons. The African-American voting age population of the County is 5,237 persons or 19.16% of the total voting age population of 27,331 persons. The African-American population is concentrated in four areas of the county: Pocomoke, Stockton, Snow Hill and Berlin.

The Board serves as the legislative and governing body of the County. Its members are elected at-large[1] under a residency district system. The entire electorate of Worcester County votes on candidates for each of the five seats. Four of the seats correspond to the County's residency districts. Candidates are required to reside in the appropriate district. The fifth member, the commissioner-at-large, must be a resident of the County, but is not subject to a district residency requirement. The five candidates who receive the most votes in the general election are elected to the Board.

The plaintiffs allege that the system for electing the Board violates § 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1982). Based on the theory of "vote dilution," the plaintiffs' claim alleges that under the current election system, the votes of African-American citizens are diluted when compared to the votes of the white majority.

DISCUSSION

Section 2 of the Voting Rights Act provides:

> (a) No voting . . . practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .

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[1] In an at-large election, the entire jurisdiction forms a single electoral district from which all the officials are chosen.

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes . . . are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representative of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (Supp. 1991).[2]

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[2] The Senate Judiciary Committee Report accompanying the bill which amended § 2 sets out factors which might be probative of a violation. The seven "typical factors" and two "additional factors" are:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provision, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which

The § 2 amendments make clear that a violation of the section can be proved by showing discriminatory effect alone, rather than having to show a discriminatory purpose, and establish that the relevant legal standard is the "results test." Under the results test, courts can invalidate "at-large" electoral systems if plaintiffs prove that the system operates to "dilute" the vote of minority voters, or limits their opportunity to participate in the political processes and to elect legislators of their choice. *White v. Regester,* 412 U.S. 755 (1973). This test challenges those at-large systems which work to systematically exclude minority-preferred candidates, on the theory that in an at-large system, "where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Thornburg v. Gingles,* 478 U.S. 30, 49 (1986).

In setting forth the elements for a successful § 2 challenge, the plaintiffs must prove three preconditions: 1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; 2) the minority group is politically cohesive; and 3) the majority votes sufficiently as a bloc to enable it, in the

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hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

9. whether policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. Rep. No. 97-417, 97th Cong. 2d Sess. 28 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07.

absence of special circumstances, usually to defeat the minority's preferred candidate. *Gingles,* 478 U.S. at 50-1. Although these three factors are preconditions to a § 2 claim, "the essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by African-Americans and white voters to elect their preferred representative." *Id.* at 47.

A. *Sufficiently Large and Geographically Compact*

The first factor requires the minority group to prove that it is sufficiently large and geographically compact to create a majority, if it were voting in a single-member district. *Gingles,* 478 U.S. at 50. Plaintiffs have presented two alternative district configurations,[3] each having a majority African-American voting age population within a five-district plan.[4] The African-American population is spread throughout several regions of the County, but it is concentrated in several small pockets which can be connected to create a district with a majority African-American voting age population of 58% to 62%. *See McGhee v. Granville County,* 860 F.2d 110, 115 (4th Cir. 1988) (county's proposed remedial single member district plan contained seven districts, the two minority districts had

[3] Plaintiffs also proposed a third district configuration with one majority African-American district within a seven-district plan. However, the Fourth Circuit has ruled that district courts should not change the number of members on a governing board if it is not necessary to create an African-American majority district. *Hines v. Ahoskie,* 998 F.2d 1266 (4th Cir. 1992). Therefore, the third configuration will not be considered.

[4] The plaintiffs' proposed plans have one district with a majority African-American total population and a majority African-American voting age population:

	Total Black Population	Black Voting Age Population
Plan 1	65.1%	62.1%
Plan 2	60.0%	57.8%

67.5% and 51.8% minority voting age populations and thus met the relevant standard); *Soloman v. Liberty County,* 899 F.2d 1012, 1018 (11th Cir. 1990), *cert. denied,* 498 U.S. 1023 (1991) (the evidence showed the African-Americans would constitute a majority of a district's voting age population); *Westwego Citizens for a Better Government v. Westwego,* 946 F.2d 1109, 1117 (5th Cir. 1991) (proposed plan showed the district would have an African-American majority of 59.1% of the total population and an African-American voting majority of 52.8%).

The defendants claim that it is not possible to draw a district which contains an African-American voting majority that is reasonably compact and argue that such a district would be too winding and irregular in shape to be acceptable under the governing standards. However, compactness is a relative concept which must be interpreted in light of § 2's "laudatory national mission" of opening the political process to minorities. *See Dillard v. Baldwin County Bd. of Educ.,* 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988); *Neal v. Coleburn,* 689 F. Supp. 1426, 1435 (E.D. Va. 1988).

The plaintiffs' proposed Plan 1 is not unreasonably irregular in shape, considering the population dispersal within the County. The plan merely affirms the existing racial divisions in the County. While the plan does entail running the newly created districts across other voting district lines and through towns, this is unavoidable because of the heavy white population and the need to achieve a majority African-American population in one of the districts. The districts may not be symmetrical, but they are compact. They do not rely on districts that run through several "tentacle-like corridors" nor are the district's boundary lines so unreasonably irregular, bizarre or uncouth as to approach obvious gerrymandering. They are in line with the configurations of electoral districts that have been approved in other cases.

B. *Racially Polarized*

Racially polarized voting represents "a consistent relationship between [the] race of the voter and the way in which the voter votes," *Gingles,* 478 U.S. at 46, n. 11, and is politically or substantively significant if a cohesive minority electorate is typically unable to elect its preferred candidate in the face of majority opposition. *Id.* at 55. However, there is no simple doctrinal test for determining whether a certain level of racially polarized voting is legally significant. *Id.* at 57. "Discrete inquiries into minority and white voting practices" is necessary to determine whether a given district experiences legally significant racially polarized voting. *Id.* at 56.

1. *Politically Cohesive*

Plaintiffs must show that African-Americans are sufficiently cohesive in their voting behavior to be treated as a group with common political interests. To prove this, plaintiffs must show that "a significant number of minority group members *usually* vote for the same candidates." *Gingles,* 478 U.S. at 56 (emphasis added).

At trial, the plaintiffs relied upon the testimony of Theodore S. Arrington, Ph.D., Professor of the Department of Political Science at the University of North Carolina. The Court qualified Dr. Arrington as an expert to testify on voting behavior, political analysis, party politics and racial voting patterns. To counter Dr. Arrington's testimony, the defendants presented testimony from Ronald E. Weber, Ph.D., Professor of Government and Political Science at the University of Wisconsin. Dr. Weber was qualified as an expert to testify on political science, statistics, vote dilution, demography and political systems.

The experts used two methods for analyzing voting behavior in Worcester County: ecological regression analysis and homogeneous case analysis, both methods having

been approved in *Gingles*, 478 U.S. at 52-53. Ecological regression analysis seeks to express the relationship between two variables: the votes for a given candidate and the percentage of African-Americans or whites in a precinct. Data points from each precinct are plotted on a graph known as a "scatterplot." The graph illustrates how the vote for a preferred candidate changes as the percentage of African-Americans or whites in the precinct rises. Both experts agreed that the estimates of voting cohesion among African-Americans are questionable because the nine, majority-white precincts must be used to project the voting behavior of African-Americans in Worcester County and because the scatterplot of those white precincts is truncated.

Homogeneous case analysis is used to validate the results of the ecological regressional analysis. In homogeneous analysis, the actual vote is studied in precincts that are at least 90% or more of one race. Because there are no African-American majority precincts in Worcester County, neither expert could validate the results of the ecological regression analysis in determining minority cohesion.

The first election in Worcester County in which an African-American was a candidate for County Commission was in 1982. The statistical evidence shows that the African-American candidate received 49% of the African-American vote. Both experts agreed that such a showing by the African-American Community for a first time minority candidate for County Commissioner was impressive, but disagreed on whether the showing was sufficient to demonstrate cohesion.[5]

The next County Commissioner election that included an African-American candidate was in 1986. The minor-

[5] The experts also disagreed on the percentages necessary to demonstrate minority cohesion. A 60% vote is generally regarded as evidence of a landslide victory in American political history and is the more appropriate benchmark.

ity candidate, a Republican, received 62% of the African-American vote. Dr. Arrington testified that African-Americans generally vote for Democrats and this election showed cohesion because the minority community had to cross party lines to vote for its preferred candidate.

Finally, in the 1990 Democratic Primary for County Commissioner, District 1, the minority candidate received 40% of the African-American vote. The lay testimony at trial indicated this candidate did not attempt to win the election, making an analysis meaningless.

The derivative statistical evidence for projecting minority cohesion in Worcester County is not reliable because of the lack of available data and the truncated scatterplot. In situations where the election data and derivative statistical information is unavailable because the minority group has just recently begun to sponsor candidates or where the data is unreliable, the plaintiffs may rely on factors beyond endogenous[6] election data that prove political cohesion. *See Gingles,* 478 U.S. at 57, n. 25; *Hall v. Holder,* 955 F.2d 1563, 1571 (11th Cir. 1992).

The most probative exogenous elections are those that include African-American Democratic candidates against white Democratic candidates.[7] The minority preferred candidate in the 1984 Democratic Primary for President, Jesse Jackson, received 79% of the minority vote, and in the 1988 election, 55% of the minority vote. The Jackson elections are probative of cohesion and show that the

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[6] Endogenous elections include voting patterns in elections for offices the plaintiffs challenge in their § 2 suit.

[7] The expert testimony established that elections involving African-American Republican candidates are problematic because African-Americans generally vote for Democratic candidates.

This Court also finds that the 1982 and 1986 Democratic Primaries for the Democratic Central Committee are not probative of cohesion because the lay testimony established that the African-American candidate ran for office frequently and voters did not consider him a serious candidate.

African-American Community strongly agreed upon whom the Democratic party should nominate. The 1986 State Democratic Primary for Lieutenant Governor and Governor is also probative of cohesion. The ticket that included a minority candidate received 67% of the African-American vote.

Further, there is a precedent in Worcester County that when a town government changes its electoral mechanism from an at-large to a single member district election system, African-Americans will elect an African-American candidate. In Pocomoke, with a 34% African-American population as of 1980, no African-American was elected at-large to the town council. After the creation of a single-member district, one of which has an African-American majority, a minority candidate was elected. Similar election patterns occurred in Snow Hill and Berlin.[8]

There was testimony that when a government changes from an at-large to a single member system, the discouragement in the African-American community which decreases cohesion is mitigated and the financial and other campaign resources flow more to the minority candidates than the white candidates. The voting patterns from the towns in Worcester County show that the elimination of an at-large electoral mechanism makes it more likely that the African-American community will vote cohesively in Worcester County.

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[8] In Snow Hill only one African-American was elected to the Town Commission until a three-district system was implemented in 1985. In the following election, an African-American candidate was elected from the African-American majority district.

No African-American candidate had been elected to the five-member Berlin Town Council until 1980. After the town changed to a four single-member district and one at-large system with two of the districts consisting of African-American majorities, two African-Americans have been elected. The occcasional success of an African-American candidates in a particular election does not necessarily disprove the existence of racial polarization. *Collins*, 816 F.2d at 937-38.

Additionally, the County's African-American community is also politically active. It supports the local chapter of the NAACP which takes positions on issues of interest to the African-American community. *See Neal,* 689 F. Supp. at 1436. Indeed, the President of the NAACP testified that when Berlin was considering a redistricting proposal, the African-American community "worked together like a family." *See Sanchez v. Bond,* 875 F.2d 1488, 1493 (10th Cir. 1989), *cert. denied,* 498 U.S. 937 (1990) (a trial court may consider lay testimony in deciding the second *Gingles* factor); *Westwego,* 946 F.2d at 1118, n. 12 (plaintiffs may prove cohesion even without statisitcal evidence of racial polarization). Thus, the credible evidence establishes that African-Americans are politically cohesive in Worcester County.

2. *White Bloc Voting*

"The purpose of inquiring into the existence of racially polarized voting is . . . to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidate." *Gingles,* 478 U.S. at 55. There are no absolute standards for gauging white bloc voting. This analysis requires a review of the extent to which white voters "bloc vote" for candidates of their choice, and assessing whether this pattern has the effect of minimizing the opportunities of minorities to participate in the system.

The experts compared election results for a twelve year period. In the two County Commissioner elections where the minority preferred candidate was an African-American, the candidates received low percentages of votes from the white community and secured higher levels of support from the African-American community. In the 1982 Democratic Primary for County Commissioner, the minority preferred candidate received 49% of the African-American vote and 0% of the white vote. The minority preferred candidate in the 1986 General Election for

County Commissioner received 62% of the African-American vote and 32% of the white vote.

In the third County Commissioner election the white minority preferred candidate received 60% of the African-American ballots and 77% of the white votes. The minority candidate in this race received 40% of the African-American votes and 23% of the white votes.

When considering the limited number of endogenous elections, it is also appropriate to consider exogenous elections to prove racially polarized voting. *See, e.g., Jenkins v. Red Clay Consolidated School District Bd. of Education,* 4 F.3d 1103, 1130 (3d Cir. 1993) ("an inability to offer statistical evidence on a large number of elections should not necessarily foreclose a voting rights claim"); *Citizens for a Better Gretna v. Gretna,* 834 F.2d 496, 503 (5th Cir. 1987), *cert. denied,* 492 U.S. 905 (1989) ("the use of exogenous elections in cases with 'spare relevant statistical data' " is appropriate, but plaintiffs also presented endogenous evidence); *McDaniel v. Mehfoud,* 702 F. Supp. 588, 593 (E.D. Va. 1988) (Racially polarized voting can be established through both anecdotal evidence and electoral analysis).

In the exogenous elections the minority preferred African-American candidates received high levels of African-American support and low levels of white support. The minority preferred candidate in the 1984 Democratic Primary for President received 79% of the African-American vote and only 5% of the white vote. In the 1986 Democratic Primary for Lieutenant Governor and Governor, the minority preferred candidate received 67% of the African-American vote and only 13% of the white vote. The preferred African-American candidate in the 1988 Democratic Primary for President, received 55% of the minority vote and only 4% of the white vote. In the 1986 General election for Judge of the Orphans'

Court the minority preferred candidate received 44% of the African-American vote and 17% of the white vote.

In the other elections examined by the experts, the minority preferred candidates were white. In the 1978 General Election for Judge of Orphans Court, the minority preferred candidates received from 48% to 65% of the African-American vote and from 41% to 48% of the white vote. The minority preferred candidate, a white Democrat, in the 1988 General Election for United States Senator, received 60% of the African-American vote and 52% of the white vote. In the 1990 General Election for United States Senator, the minority candidate of choice received 70% of the African-American vote and 73% of the white vote.

Although all elections are relevant in determining white bloc voting, the elections in which the preferred minority candidate is an African-American are more probative. *See Gretna,* 834 F.2d at 503. Section 2 specifically provides that the section is violated if "members [of a protected class] have less opportunity than other members of the electorate to participate in the political process and to elect *representatives of their choice.*" 42 U.S.C. § 1973(b) (emphasis added).

In addition to reviewing statistics, the Court must consider additional factors to determine if the white bloc vote is legally significant. Several factors can influence a court's determination of whether white bloc voting is legally significant. *Gingles,* 478 U.S. at 56. If present, these other factors—the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts and prohibitions against single-shot voting, the number of seats open, and the number of candidates in the field, are supportive of the minority voters' claim. *Id.* at 48, n. 15.

The current residency system employed by Worcester County requires individual minority candidates for County

Commission to run one-on-one, county wide against individual white candidates. This system aggravates the political disadvantage of the County's minorities. *See Ward v. Columbus County,* 782 F. Supp. 1097, 1104 (E.D. N.C. 1991). Even under the best of circumstances, the at-large system debases the value of the minority's political strength.

Another factor that shows whites vote as a bloc is that in the entire history of Worcester County, with a 20% African-American population, no African-American has won a county office in a county-wide head-to-head contest against a white candidate. *See Gingles,* 478 U.S. at 48 n. 15 (one of the "most important" of the Senate Report factors in demonstrating inequality of electoral opportunity is "the extent to which minority group members have been elected to public office in the jurisdiction").

3. *White Crossover Voting*

The election results examined by the experts were not altered by the white crossover vote which was minimal. Based on Dr. Weber's analysis, the average white crossover vote in Worceseter County was 19%. In a county that has a 20% African-American voting age population and an 80% white voting age population, the African-American candidate cannot win a residential post at-large election.

Dr. Arrington analyzed the probable outcome of a race where there is an African-American candidate opposed by a white candidate and there are high levels of cross over voting and minority cohesion. The results of the analysis support the conclusion that an African-American candidate will lose in county-wide elections.

The statistics taken together with the voting patterns and electoral system show that the white majority votes significantly as a bloc to enable it "usually to defeat the minority's preferred candidate," *Gingles,* 478 U.S. at 51, and that the plaintiffs have satisfied the third requirement

for proving a cause of action under the Voting Rights Act when the inhibiting electoral device is a residential post, at-large election system.

C. *Totality of the Circumstances*

This Court also examined the factors in the Senate Judiciary Committee Report accompanying the bill which amended § 2. Maryland and its political subdivisions bear a history of official racial discrimination against African-Americans. The Maryland Constitution of 1867 limited the right to vote to white males. Until 1864, slavery was authorized by the state constitution. Until the Fifteenth Amendment to the United States Constitution was ratified in 1870, African-Americans were denied the right to vote under the state constitution. Maryland failed to ratify this Amendment.

Legal segregation affected African-Americans in many aspects of daily life in the early 1900s. During this period, laws which made property ownership a prerequisite to voting were enacted in the County. The judicially noticed facts also show a history of official resistance to desegregation in Worcester County. It did not fully desegregate its schools after the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954).

Accordingly, under the totality of the circumstances, the current system for election to the Worcester County Commission interacts with past and present discrimination to deprive African-Americans of Worcester County the same "opportunity [as] other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

Remedy

Once a violation of voting rights has been established the Court "should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides

equal opportunity for minority citizens to participate and to elect candidates of their choice." 1982 U.S.C.C.A.N. 208. However, in exercising its equitable powers, the Court should give the appropriate legislative body the first opportunity to provide a plan that remedies the violation. *See McGhee*, 860 F.2d at 115. If the legislative body fails to respond, or responds with a proposed remedy that constitutes a § 2 violation, then the Court must fashion an appropriate plan. *Id.*

The legislative body should not limit its discussion of a proposed plan to single member districts which is the traditional remedy for minority vote dilution cases. Rather, it should also examine other schemes that will remedy vote dilution in Worcester County such as the modified multi-seat electoral systems, in particular, limited voting, cumulative voting and the single transferable vote. These are systems through which elections may be held in at-large districts without systematically diluting the votes of minorities. *See* Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 Stetson L. Rev. 743 (1992); Richard L. Engstrom, *The Single Transferable Vote: An Alternative Remedy for Minority Vote Dilution*, 27 U.S.F. L. Rev. 781 (1993).

Accordingly, the Court will grant defendants 60 days to submit an acceptable remedial plan.

/s/ Joseph H. Young
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. Y-92-3226

HONISS W. CANE, JR., *et al.*

v.

WORCESTER COUNTY, MARYLAND, *et al.*

YOUNG, Joseph H., Senior United States District Judge

Date: April 4, 1994

MEMORANDUM OPINION

The pending question, premised on § 2 of the Voting Rights Act of 1965, as amended and extended, 42 U.S.C. § 1973, is whether the Court should adopt Bill 93-6, enacted by the defendants on May 18, 1993 or impose a court ordered plan.

I.

Plaintiffs filed an action under § 2 of the Voting Rights Act of 1965 challenging the system used by Worcester County to elect county commissioners. By Memorandum Opinion, dated January 7, 1994, the Court held that the system utilized to elect the Worcester County Commission, the governing body of Worcester County, prevented minorities from electing a candidate of their choice. *See*

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[1] Defendants' appeal of this ruling was dismissed by the United States Court of Appeals for the Fourth Circuit on March 3, 1994.

Cane v. Worcester County, 840 F. Supp. 1081, 1090 (D. Md. 1994).

This Court's decision was based on the Worcester County electoral system that was used to elect the current county commission (the "old system"). Under this system, the entire electorate of Worcester County voted on candidates for each of the five seats. Four of the seats corresponded to the County's four residency districts. Candidates were required to reside in the appropriate district. The fifth member, the commissioner-at-large, was required to reside in the County, but was not subject to district residency requirements. The five candidates who received the most votes in the general election were elected to the Board. *Cane*, 840 F. Supp. at 1084-85.

Although the Court ordered the defendants to submit a proposed remedial plan by March 8, 1994, by letter dated February 23, 1994, defendants' counsel indicated that their proposed remedial plan "was embodied in Bill 93-6, which the Court did not consider or evaluate in its January 7, 1994, Memorandum Opinion." Bill 93-6 (the "new system") was enacted on May 18, 1993, six months after the complaint in this case was filed. No elections have been held since its enactment.

Bill 93-6 eliminated the commissioner-at-large position and created a fifth commissioner residence district based on the 1990 census data.[2] In the "Legislative Findings" of the Bill, the County Commission found that a fifth population center had developed and this change in the population patterns warranted the creation of this fifth commissioner residence district.

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[2] Under Bill 93-6, the County Commission created the fifth residence commissioner district by dividing Commissioner Residence District No. 3, under the old system, between Berlin and Ocean Pines. The new residence commissioner district includes St. Martin and Ocean Pines and is titled Commissioner Residence District No. 5. Residence Commissioner District No. 3, under Bill 93-6, includes Berlin and the surrounding area. The other three residence commissioner districts remained the same under Bill 93-6.

On March 11, 1994, plaintiffs proposed two remedial plans and filed a Motion for Adoption of the Plan. Plaintiffs contend that the defendants waived their opportunity to participate in the remedial process because they failed to submit an acceptable remedial plan. Accordingly, plaintiffs ask this Court to order the defendants to adopt one of these proposed plans.[3] The defendants contend that Bill 93-6 is legally acceptable.

On March 25, 1994, the Court heard arguments on the proposals. The defendants rejected plaintiffs' two proposals as legally unacceptable and stated that, if the Court deems the plans acceptable, the defendants have no preference as to either plan, and that they would not submit any remedial plans. The plaintiffs argued that Bill 93-6 was implicitly found violative of § 2 in the Court's Memorandum Opinion and that it was not an acceptable remedial plan.

II.

After a federal court has found a violation of § 2 of the Voting Rights Act and provides the appropriate legislative body the first opportunity to devise an acceptable remedial plan, "the court's ensuing review and remedial powers are largely dictated by the legislative body's response." *McGhee v. Granville County*, 860 F.2d 110,

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[3] Plan A: A single-member district arrangement with one black majority district. Referred to as District Plan I in the Court's January 7, 1994 Memorandum Opinion. *Cane*, 840 F. Supp. at 1086. Under this Plan, the candidates for the five-member Board must be residents of the district from which they seek election, and only those voters who reside within the district are eligible to vote for candidates seeking election from that district. The candidate who receives the most votes in each district is elected to the Commission.

Plan B: A cumulative voting plan. An at-large election system in which five Commissioners are elected by all registered voters within the County. Each voter may cast up to five votes in a Commission election, and may cumulate his or her votes for one or more chosen candidates. Winning candidates are the top five who receive the most votes of all Commission candidates seeking office.

115 (4th Cir. 1988). If the legislative body responds with a legally unacceptable remedy or fails to respond, the court must fashion a remedy. *Id.*; *see Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985). The plan is legally unacceptable if it fails to remedy the particular dilution violation, *McGhee*, 860 F.2d at 118, and fails to conform to § 2 of the Voting Rights Act. *Dillard v. Crenshaw County*, 831 F.2d 246, 249 (11th Cir. 1987); *see Upham v. Seamon*, 456 U.S. 37, 43 (1982). The proposed system must be measured by the historical record, the difference from the old system, and by prediction. *Dillard*, 831 F.2d at 250.

Worcester County has a population of approximately 35,028, 21.26% of whom are black and are concentrated in four areas of the county: Pocomoke, Stockton, Snow Hill and Berlin. Its current county commission was elected by an electoral system consisting of one member from each of the four residency districts and a fifth member, the commissioner-at-large, not subject to the district residency requirement. All five members are elected at-large. Under Bill 96-3 the county commission consists of one commissioner from each of the five residency districts which are elected at-large. It eliminated the commissioner-at-large.

In its January 7 Memorandum Opinion, this Court found that since the 1860's the State of Maryland and some of its political subdivisions have discriminated against blacks by resisting desegregation and employing mechanisms that prevented them from having the same opportunity to vote as other members of the electorate. *Cane*, 840 F.Supp. at 1091. The Court also found that the black population of Worcester County is politically cohesive and a geographically insular minority group, *Id.* at 1087-89, and that even where there are high levels of cross-over voting and minority cohesion, black candidates will be defeated. *Id.* at 1090. Finally, in Worcester

County no black candidate has won a county office in a county-wide head-to-head contest against a white candidate.

The evidence is clear and convincing that due to the voting patterns, the residential at-large requirements and the past and present discrimination of blacks, their voting strength is diluted. Any effective cure for this § 2 violation must therefore reach not only the commissioner-at-large, which Bill 96-3 eliminated, but it must remove the dilutive aspect of the old system. Bill 96-3 does not do this.

Bill 93-6 merely eliminated the commissioner-at-large, created a fifth commissioner district in the Ocean Pines area and retained the at-large, residential electoral system. Blacks will continue to run one-on-one, county-wide, under Bill 93-6. In essence, the blacks' opportunity to elect a candidate of their choice is no better than the old system.[4] Thus, the distinction between Bill 93-6 and the old system does not remedy the dilution violation under § 2 of the Voting Rights Act. Indeed, Bill 93-6 violates § 2.

Defendants argue that the plaintiffs must introduce competent evidence demonstrating that Bill 93-6 is unacceptable and that it is improper to compare it to the old electoral system. Such a review is impossible because there have been no elections under Bill 93-6.

III.

Bill 93-6 is legally unacceptable and the defendants refuse to offer a remedial plan or express a preference for either of the plaintiffs' proposed plans. Accordingly, this Court must use its remedial authority under § 2 of the Voting Rights Act to impose a court-ordered plan.

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[4] Even if, under Bill 93-6, the newly created Commissioner District No. 5 and the modified Commissioner District No. 3 has a black majority voting age population, it does not increase the minority's opportunity for electing a candidate of its choice.

> A district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. Once a right and a violation has been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

United States v. Paradise, 480 U.S. 149, 183-84 (1987) (internal quotations and citations omitted). This power is limited by the nature and extent of defendants' violations.

The plaintiffs have proposed two remedial plans: Plan A, single-member districts with a black majority district, and Plan B, cumulative voting. Since neither of the plaintiffs' proposals violate § 2, the issue is whether, based on the voting patterns in Worcester County, the blacks will have an opportunity to elect a candidate of their choice. In determining whether the plaintiffs' proposed plans offer such an opportunity, the Court will apply the coefficient called the threshold of exclusion.[5]

Under the single-member district plan one of the five districts would have a black voting age population of 62%. The threshold of exclusion is more than 50%. With a majority-vote requirement, any group that constitutes more than 50% of the electorate in that district is guaranteed that its preferred candidate will win. Thus, blacks would have a realistic opportunity to elect a candidate of their choice in the district where they have a majority.

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[5] This coefficient identifies the percentage of the electorate that any group must exceed to elect a candidate of its choice regardless of how the rest of the electorate votes. Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 Stetson L. Rev. 743, 750 (1992).

Under the cumulative voting arrangement, the threshold of exclusion is 16.7%.[6] Thus, any group that constitutes more than 16.7% of the voters can elect a candidate if they cumulate their votes for that candidate. If 1,000 electors vote for five positions, and if only five candidates are preferred by the majority, with an evenly split vote, a minority would need only 835 of the 5,000 votes, to elect the candidate of their choice. Because the black voting age population in the county is 19.16%, cumulative voting offers them the opportunity to elect a candidate of their choice.

However, the coefficient should not be applied in a vacuum. It is incumbent upon this Court to give great deference to legislative judgments about the nature and scope of the proposed remedy, *see McGhee*, 860 F.2d at 115; *Thornburg v. Gingles*, 478 U.S. 30, 78-79 (1986), and to reconcile the requirements of the statute with the goals of county political policy. *See Connor v. Finch*, 431 U.S. 407, 414 (1977).

In the "Legislative Findings" of Bill 93-6, the Worcester County Commission expressed a preference for an at-large electoral system because of the long history and tradition, and the importance and value of allowing all the citizens to vote for all the candidates for County Commission. (Bill 93-6, Para. 1, 3). The County Commissioners who testified during the trial wanted to avoid creating a single-member district with a black majority because it would cause County Commissioners to identify with the interests of a particular geographic area.

Cumulative voting would not disturb the existing structure of government in Worcester County. Each candidate

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[6] The threshold of exclusion in a cumulative voting arrangement is dependent on the number of seats to be filled in a given election. It may be calculated through the following formula:

$$\frac{1}{1 + \#\text{ of seats}}$$

must run in the district as a whole and there is little political advantage in becoming identified with the interest of a particular locality. Thus, cumulative voting is a less drastic remedy than the single-member district plan.

The County Commission also found that dividing a municipality into two districts or combining two municipalities into the same district would be disadvantageous to common interests. (Bill 93-6, Para. 9). Instead, the County Commission expressed a preference for retaining the traditional residential election districts.

Cumulative voting, unlike single-member districts, will allow the voters, by the way they exercise their votes, to "district" themselves based on what they think rather than where they live. Thus, cumulative voting is less intrusive than single-member districts and would not require the county to divide or combine its municipalities for district purposes.

Finally, the County Commissioners wanted the successful candidates to reflect the collective interests of a greater number of citizens resulting from a county-wide election. This, the Commission contended, minimizes the likelihood of electing candidates who may not be interested in addressing all the diverse and varied issues before it. (Bill 93-6, Para. 9).

Cumulative voting is less likely to increase polarization between different interests since no group receives special treatment at the expense of others as would occur in a single-member district with one black majority district. It permits the blacks in Worcester County to achieve representation when their overall size and identity of interests are sufficient to elect a candidate. Unlike the single-member district plan, the cumulative voting plan is consistent with the county political policy goals and, also provides blacks with an opportunity to elect a candidate of their choice.

IV.

Under different facts, the Fourth Circuit has suggested that single-member districts are the only appropriate remedy in § 2 cases under a court-ordered plan. *McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988). In *McGhee*, the parties had stipulated that the Granville County at-large method of electing members to its County Commission violated § 2 of the Voting Rights Act. After the parties failed to agree to a remedy, the district court rejected the County's proposed single-member district plan and instead ordered a modified version of the plaintiff's responsive proposal for a plan based upon "limited voting" [7] in at-large elections. When the plaintiffs challenged at-large elections that prevented black candidates from being elected, the court found the preferred remedy was to create single-member districts in which black candidates were likely to be elected. *McGhee*, 860 F.2d at 118-20; *see League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (cumulative voting mechanisms preserve at-large elections, but are not remedies for the particular structural problem that the plaintiffs have chosen to attack).

Here, the defendants did not concede liability based on the complaint as did the defendants in *McGhee*. Instead, this Court had the opportunity to assess the presentation of the evidence and demeanor of the witnesses, and judge their credibility, allowing the Court to reach a conclusion as to the aspect of the electoral system that violated § 2.

Further, the *McGhee* decision was based on the proposition that single-member districts are the only appropriate remedy when an at-large election system violates § 2.

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[7] Limited voting, like cumulative voting, is a modified multi-seat election system. Under limited voting, the number of seats to be filled in an election exceeds the number of candidates for whom each voter may vote. Limited voting thus promotes minority representation in many cases by preventing the majority from filling all the seats.

However, the factual findings lead this Court to conclude that under the totality of the circumstances, the current system for election to the Worcester County Commission interacted with past and present discrimination to deprive blacks an opportunity to elect candidates of their choice. *Cane*, 840 F. Supp. at 1091. This Court did not find that one particular aspect of the electoral system violated § 2. Thus, unlike *McGhee*, the court-imposed remedy will eliminate the discriminatory part of the county electoral system, the voting rule itself, and retain the part that is permissible, the underlying multimember district and the form of the elected body. *See Upham*, 456 U.S. at 43 (the court-imposed remedy is limited to those modifications of the current plan that are necessary to cure any statutory defect).

Finally, because the defendants have not proposed a legally adequate remedial plan and did not submit any other proposals or express a preference for the plaintiffs' proposals, this Court's remedial powers, unlike the court in *McGhee*, are not limited to the legislative body's response. *See McGhee*, 860 F.2d at 115. Therefore, the county will be ordered to impose a cumulative voting system to elect its county commission.[8]

/s/ Joseph H. Young
Senior United States District Judge

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[8] Cumulative voting satisfies the basic "one person, one vote" rule in that every individual voter is allocated an equal number of votes.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. Y-92-3226

HONISS W. CANE, JR., *et al.*

v.

WORCESTER COUNTY, MARYLAND, *et al.*

ORDER

In accordance with the attached Memorandum, it is this 7th day of January, 1994, by the United States District Court for the District of Maryland, ORDERED:

1. That judgment BE, and the same IS, hereby ENTERED in favor of the Plaintiffs;

2. That the Defendants SUBMIT a proposed remedial plan within 60 days of the date of this Order; and

3. That a copy of this Memorandum and Order be mailed to counsel for the parties.

/s/ Joseph H. Young
Senior United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. Y-92-3226

HONISS W. CANE, JR., *et al.*

v.

WORCESTER COUNTY, MARYLAND, *et al.*

ORDER

In accordance with the attached Memorandum, it is this 4th day of April, 1994, by the United States District Court for the District of Maryland, ORDERED:

1. That Plaintiff's Motion for Adoption of Plaintiffs' Proposed Remedial Plan BE, and the same IS, hereby GRANTED;

2. That the defendants amend the election system for the primary and general elections for Worcester County Commission in accordance with the attached Memorandum and begin implementation of a cumulative voting system within sixty (60) days; and

3. That a copy of this Memorandum and Order be mailed to counsel for the parties.

/s/ Joseph H. Young
Senior United States District Judge

APPENDIX F

[Filed October 12, 1994]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1579
CA-92-3226-Y

HONISS W. CANE, JR.,
Plaintiff-Appellee

v.

WORCESTER COUNTY, MARYLAND; GEORGE M. HURLEY; JOHN E. BLOXOM; REGINALD T. HANCOCK; FLOYD F. BASSETT; JEANNE LYNCH, Members, Worcester County Board of Commissioners,
Defendants-Appellants

and

GEORGE H. DRYDEN; HINSON FINNEY; MARK FROSTROM,
Defendants

WASHINGTON LEGAL FOUNDATION; CENTER FOR VOTING AND DEMOCRACY; UNITED STATES OF AMERICA,
Amici Curiae

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no

member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk

APPENDIX G

[Filed October 19, 1994]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1579
CA-92-3226-Y

CANE

v.

WORCESTER COUNTY MD

MANDATE

The judgment of this Court dated 9/16/94 takes effect today.

BERT M. MONTAGUE
Clerk

APPENDIX H

Excerpt from Direct Examination of Theodore S. Arrington Volume 2

* * * *

[69] * * * If you drew districts recognizing that difference, you would just be recognizing what already exists.

* * * *

Excerpt from Cross-Examination of Theodore S. Arrington Volume 2

* * * *

[92] Q Have you undertaken to determine the existence of communities of interest in Worcester County?

A From the evidence that I've heard, I have drawn the conclusion that black citizens in Worcester County have a community of interest, and that that community of interest transcends the various localities, the various [93] municipalities. I have not done a detailed study of what other communities of interest might very well exist in Worcester County.

* * * *

Excerpt from Cross-Examination of William Cooper Volume 2

* * * *

[137] Q Mr. Cooper, in terms of how you prepared the map that contains or displays proposed District 1, would it be fair to say that what you have done is, you have linked together the black population concentrations in these three noncontiguous communities in order to segregate black citizens into a separate district, wherein they will have a majority of the voting age population? Isn't that what you've done?

A Well, obviously, that's what we've done.

* * * *

APPENDIX I

COUNTY COMMISSIONERS OF
WORCESTER COUNTY, MARYLAND

No. 93-6

By: Commissioners Bloxom, Bassett, Hancock, Hurley, and Lynch

INTRODUCED: April 6, 1993

AMENDED: May 18, 1993

A BILL ENTITLED

AN ACT concerning

Election Districts and Commissioner Districts AND COMMISSIONER QUALIFICATION

For the purpose of creating a new Election District No. 6; adjusting the boundary lines of Election Districts 3, 5, and 10; **[and]** * amending Commissioner Districts; AND DELETING REAL PROPERTY OWNERSHIP QUALIFICATION FOR COUNTY COMMISSIONERS.

Section 1. LEGISLATIVE FINDINGS: The County Commissioners of Worcester County, Maryland, acting pursuant to legislative authorities granted in Article XIF of the Maryland Constitution and Article 25B of the Annotated Code of Maryland, do hereby make the following legislative findings with respect to election districts, commissioner districts, and elections of County Commissioners in Worcester County.

1. Worcester County has a long history and strong tradition of election districts based upon popu-

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* Bold bracketed material struck through on original.

lation centers and defined geographic areas of the County. In 1798 the Maryland General Assembly recognized that it was inconvenient to require all of the citizens of the County to vote in one place and determined that each County shall be divided into election districts to allow citizens to vote in polling places in the vicinity of their residences. Worcester County was to be divided into five election districts, and the Acts of 1799 provided for the appointment of Commissioners to determine the boundary lines of the five election districts. The districts established in 1799 included: No. 1—Costens, presently known as Pocomoke, consisting of the southern part of the County; No. 2—Snow Hill, consisting of the central area of the County; and No. 3—Trap, presently known as Berlin, consisting of the northern portion of the County. Two additional districts, Dennis and Johnson, were created in areas most of which are presently a portion of Wicomico County. To accommodate changing patterns of population in the different geographical areas of the County and to keep election districts geographically compact, the General Assembly, over time, has adjusted boundary lines and created and abolished election districts. In 1826 the General Assembly provided for the division of the Johnson and Dennis districts which resulted in the creation of the Atkinson's Election District, which is presently identified as District No. 7. In 1843 the General Assembly created the Newark Election District around the village of Newark, presently identified as Election District No. 4. In 1852 the General Assembly created the St. Martin's Election District around the village of Bishopville, presently identified as Election District No. 5. In 1868 the General Assembly created the Stockton Election District around the village of Stockton, which is presently identified as Election District No. 8. In 1933 the General Assembly created the Ocean City Election

District consisting of the town of Ocean City and vicinity, which is presently identified as Election District No. 10. The most recent boundary change or modification of election districts occured in 1965.

2. The Maryland General Assembly has recognized the desirability of, and Worcester County has for almost two centuries been well served by, having the governing body of the County representative of the distinct southern, central, and northern areas of the County. In 1798 the General Assembly enacted legislation to provide that the Governor shall appoint to the Worcester County Levy Court, which was the precursor to the Board of County Commissioners, seven Justices who shall be disbursed as equally as may be throughout the County. In 1838 the General Assembly abolished the Levy Court, replaced it with five elected County Commissioners, and established three Commissioner Districts. Commissioner District No. 1, from which there were to be two Commissioners, consisted of the Pocomoke, Snow Hill, and Atkinson Election Districts; Commissioner District No. 2, from which there were to be two Commissioners, consisted of the Berlin Election Districts; and Commissioner District No. 3, from which there was to be one Commissioner, consisted of districts which are now mostly a part of Wicomico County. In 1920 the General Assembly enacted legislation to reduce the number of County Commissioners to three and to provide for the following Commissioner Districts: Commissioner District No. 1 to include the Pocomoke Election District and Atkinson's Election District; Commissioner District No. 2 to include the Coulebourne Election District (later merged with Snow Hill), Snow Hill Election District, Stockton Election District, and Newark Election District; and Commissioner District No. 3 to include the East Berlin and West Berlin Election Districts (later consolidated) and the St. Martin's Election District. In

1959 the General Assembly enacted legislation to increase the number of Commissioners to five and to provide that Commissioner District No. 4 shall consist of the Ocean City Election District and that Commissioner District No. 5 shall consist of the County at-large. There has been no change in Commissioner Districts since 1959.

3. For 135 years the Maryland General Assembly and the citizens of Maryland by their votes to ratify the State Constitutions, have recognized the importance and value of allowing all the citizens of a County to vote in the general elections on all the candidates for the governing body of the County. The Maryland Constitution of 1851, the Maryland Constitution of 1864, and the Maryland Constitution of 1867, until it was amended in 1986 to allow for either at-large or district voting, all provided that County Commissioners shall be elected on the general ticket which has been interpreted by the Maryland Court of Appeals to require election by all qualified voters of the entire County and to forbid election by districts. Since 1851 all County Commissioner elections in Worcester County have been conducted so that all voters of the County may vote on all Commissioner candidates regardless of any residence district conditions.

4. The development of Worcester County has centered around four incorporated municipalities, each in a different area of the County, which are independent of each other and often in competition with each other for County services and facilities, government grants, and economic development. The municipalities have elected municipal officials and provide various municipal services both for the municipal residents and for the residents of the surrounding geographic area. Pocomoke City, in the southern end of the County and with a present popu-

lation of 3,922, was first settled around 1670 and was incorporated as a municipality in 1878. Snow Hill, in the central section of the County and with a present population of 2,217, was first erected into a Town by Acts of the General Assembly in 1686, and became the County Seat upon the creation of Worcester County in 1742. Berlin, in the northern section of the County and with a present population of 2,616, began to develop in the early part of the nineteenth century and was incorporated as a municipality in 1868. Ocean City, on the Atlantic Coast and with a present population of 5,146, first began to develop as a resort area around 1870 and was incorporated as a municipality in 1880. Each of these municipalities is a major population center for the County and serves as a commercial, cultural, and social center for the surrounding geographic area.

5. Over the past two decades a fifth population center has developed which has become as large and as influential as the incorporated municipalities. The community of Ocean Pines, originally planned as a resort and retirement development but now with a great many year-round residents, was approved for development in 1968 and has grown to a present population of approximately 4,000 year-round residents. The community is managed by a property owners association with directors elected by the property owners and the association provides many municipal and governmental-type services. Additional substantial development complimentary to the Ocean Pines subdivision has occured to the north along the St. Martin's River. Commercial areas have developed in the vicinity of Ocean Pines to serve Ocean Pines and the surrounding area.

6. The Pocomoke, Snow Hill, and Berlin school districts and their community schools help define community areas, serve as a focus for the commu-

nity, enhance social interaction within the district, promote areas of common interests, and foster friendly competition between districts and communities. The earliest schools in Worcester County were the Buckingham Academy in Berlin which was established in 1765, the Snow Hill Union Academy established in 1812, and the Newtown Academy established in 1838 in Pocomoke. These schools evolved into the County's first free public high schools in 1866. The present Pocomoke, Snow Hill and Berlin school districts each have their own high schools, middle schools, and elementary schools within the respective towns. Student activities, parent-teacher organizations, and little leagues and youth soccer leagues are all separately organized in each of the different school district areas.

7. Governmental and public services in Worcester County are generally decentralized and regionalized on the basis of existing municipal areas and election and commissioner districts so that County residents may have access to these services within their own area or district without having to travel to other areas for those services. Municipal governmental services are provided in Pocomoke, Snow Hill, Berlin, Ocean City, and Ocean Pines. The volunteer fire company districts of Pocomoke, Snow Hill, Berlin, Ocean City, Ocean Pines, Stockton, Girdletree, Newark, Showell, and Bishopville conform very closely to the election district areas. Federal post offices and postal areas also conform generally to the election district areas. County libraries, health centers, and parks are located in Pocomoke, Snow Hill, Berlin, and Ocean City for the convenience of County residents in each geographic area. A new hospital is under construction in Berlin which will provide medical services primarily to residents of the northern part of the County while residents in the

central and southern sectors will still generally be served by other hospitals in adjoining Counties. Other public services including electrical service, cable television, and telephone are organized so that each municipal area has a different exchange, business office, or service area. One weekly newspaper reports on news and events for the southern and central sections of the County while two other weekly newspapers provide coverage for the northern and resort area of the County.

8. The changing pattern of population growth within the County indicates that some adjustments in election district boundaries and commissioner districts and the creation of a fifth commissioner residence district, instead of the at-large district, are warranted so that each commissioner residence district has approximately the same population and is based upon one of the five population centers of the County. The 1990 Census reports that the present Commissioner District No. 1 has a population of 6,940, the present Commissioner District No. 2 has a population of 6,929, the present Commissioner District No. 3 has a population of 13,223, and the present Commissioner District No. 4 has a population of 7,936. In the present Commissioner District No. 3 the Ocean Pines area and the St. Martin's Election District account for 6,249 persons while the remainder of the Berlin Election District accounts for 6,974 persons of the 13,223 total population for that commissioner residence district. The Worcester County Comprehensive Development Plan calls for future development, and consequently future population growth, to be concentrated in the vicinity of the existing municipalities of Pocomoke, Snow Hill, Berlin, Ocean City and the community of Ocean Pines. Areas between the municipalities are planned to remain rural and agricultural and will remain at lower population densities.

9. In order to recognize regional differences and to protect areas of common interests and concerns as stated in these findings, no election or commissioner residence district should be created which divides a municipality into two districts or which combines two municipalities into the same district. The best interests of the citizens in each of the different areas of the County can be best served by: retaining the traditional election districts, with only minor boundary adjustments, which are based upon existing communities and surrounding areas, and; retaining the existing four commissioner residence districts with the creation of a new fifth commissioner residence district from a portion of the existing Commissioner District No. 3 so that there shall be one Commissioner from each of the population centers, or surrounding area, who shall be familiar with and knowledgeable of the people, conditions, needs and concerns of that particular section of the County.

10. While commissioner residence districts should be established as described in these findings, the best interests of all the citizens of all areas of the County will be best served by election of County Commissioners by all the voters of the County. The Board of County Commissioners, acting as a body rather than acting as individuals, makes decisions affecting all residents of the County. Therefore, it is fair and equitable to provide each citizen the opportunity to vote for each member of the governing body of the County, who best represent the interests and concerns of that citizen, instead of being limited to selecting only one-fifth of the governing board. Requiring each commissioner candidate to stand for election and to campaign throughout the County helps each candidate appreciate and understand the different parts of the County and encourages commissioners so elected to make decisions based upon the best interests of the entire County rather than

to pursue actions which may be beneficial to only one geographical area but which could be detrimental to the rest of the County. While regional uniqueness and differences are a part of Worcester County's heritage and should be respected, at-large elections serve to promote cooperation among the regional areas on important County-wide issues and help to minimize divisive north County—south County polarization. The at-large election arrangement requires that successful commissioner candidates receive the favorable endorsement, by vote, of approximately five times the number of citizens than would be required under a district voting arrangement; this results in the successful candidate reflecting the collective interests and intelligence of a greater number of citizens and helps to minimize the likelihood of the election of single issue candidates who may not be interested in or prepared to address all the important, diverse and varied issues which come before the governing body of the County.

11. PROPERTY OWNERSHIP REQUIREMENTS FOR COUNTY COMMISSIONERS ARE NO LONGER NECESSARY OR LEGALLY ENFORCEABLE. ALTHOUGH THE 1776 MARYLAND DECLARATION OF RIGHTS AND CONSTITUTION PROVIDED FOR PROPERTY OWNERSHIP REQUIREMENTS FOR THE GOVERNOR AND MEMBERS OF THE LEGISLATURE, THE MARYLAND LEGISLATURE IN 1809 PASSED AN ACT TO ABOLISH PROPERTY OWNERSHIP REQUIREMENTS FROM THE CONSTITUTION FOR ALL PERSONS APPOINTED OR HOLDING OFFICES OF PROFIT OR TRUST IN THE STATE. THE 1920 ENACTMENT BY THE GENERAL ASSEMBLY TO IMPOSE PROPERTY OWNERSHIP REQUIREMENTS FOR COUNTY COMMISSIONERS IN WORCESTER COUNTY HAS NOT IN RECENT

HISTORY BEEN ENFORCED AND WOULD APPEAR TO BE, IN ANY EVENT, IN VIOLATION OF THE 1809 ACT OF THE GENERAL ASSEMBLY. FURTHER, IF THE ORIGINAL PROPERTY OWNERSHIP REQUIREMENTS WERE ESTABLISHED TO INSURE THAT PUBLIC OFFICIALS PAY TAXES, SUCH SPECIFIC REQUIREMENT IS NO LONGER NECESSARY SINCE GOVERNMENTS NOW IMPOSE A VARIETY OF TAXES AND ALL CITIZENS, REGARDLESS OF PROPERTY OWNERSHIP, PAY SOME MEASURE OF TAX TO THE GOVERNMENT. PROPERTY OWNERSHIP REQUIREMENTS ALSO UNNECESSARILY LIMIT THE NUMBER OF OTHERWISE QUALIFIED RESIDENTS WHO COULD SERVE THE COUNTY AS AN ELECTED COMMISSIONER.

[11] 12. For the reasons stated in these findings it is in the best interest of all the citizens of this County, both from a regional perspective and from a County-wide perspective, that Commissioner elections continue to be conducted on an at-large basis subject to commissioner district residence requirements BUT WITHOUT PROPERTY OWNERSHIP QUALIFICATION PROVISIONS.

Section 2. BE IT ENACTED BY THE COUNTY COMMISSIONERS OF WORCESTER COUNTY, MARYLAND, that Section 3-101 of the County Government Article of Worcester County, Maryland shall be AMENDED to read as follows:

3-101. Numbers and Names of Districts. Worcester County is divided into nine election districts, and the said districts are named and numbered as follows: Pocomoke Election District, No. 1; Snow Hill Election District, No. 2; Berlin Election District, No. 3; Newark Election District, No. 4; St. Martin's Election District, No. 5; Ocean Pines Election Dis-

trict, No. 6; Atkinson's Election District, No. 7; Stockton Election District, No. 8; and Ocean City Election District, No. 10. District No.'s 1, 2, 4, 7 and 8 shall retain their present bounds and limits. District No.'s 3, 5 and 10 shall retain their present bounds and limits except for such boundary changes as described in Sections 3-105, 3-106, and 3-107 of this Subtitle. District No. 6 shall have boundaries as described in Section 3-105 of this Subtitle.

Section 3. BE IT ENACTED BY THE COUNTY COMMISSIONERS OF WORCESTER COUNTY, MARYLAND, that Section 3-105 of the County Government Article of the Code of Public Local Laws of Worcester County, Maryland shall be ADDED to read as follows:

3-105. Election District No. 6 Created; Boundaries: Election District No. 6, Ocean Pines, is hereby created from the northeasterly portion of the Berlin Election District to include the area within the following boundary lines: Beginning at the intersection of Turville Creek and Herring Creek, thence in a westerly directly along the middle of Turville Creek to Maryland Route 589, thence in a northerly and north-westerly direction along the middle of Maryland Route 589 to Maryland Route 113, thence in a northerly direction along the middle of Maryland Route 113 to South Branch Creek, thence in a northeasterly direction along South Branch Creek to Shingle Landing Prong, thence in an easterly direction along Shingle Landing Prong and St. Martin's River to the Isle of Wight Bay, thence in a southwesterly direction to Turville Creek and the point of beginning. The area and northeasterly boundary of the Berlin Election District is hereby amended to conform with the southwesterly boundary of new Election District No. 6.

Section 4. BE IT ENACTED BY THE COUNTY COMMISSIONERS OF WORCESTER COUNTY,

MARYLAND, that Section 3-106 be ADDED to the County Government Article of the Code of Public Local Laws of Worcester County, Maryland to read as follows:

3-106. Change in Boundary Line Between Election Districts No. 3 and No. 5: The boundary line between the Berlin Election District No. 3 and the St. Martin's Election District No. 5 is hereby changed to be: Beginning at the Pocomoke River at Pine Ridge Branch, thence in a easterly direction along Pine Ridge Branch to Sheppard's Crossing Road, thence in a southeasterly direction along the center of Sheppard's Crossing Road to Back Street, thence in an easterly and southerly direction along the center of Back Street to Circle Road, thence in an easterly direction along the center of Circle Road to Maryland Route 346, thence in an easterly direction along the center of Maryland Route 346 to Carey Road, thence in an easterly direction along the center of Carey Road to Jones Road, thence in an easterly direction along the center of Jones Road to Cathell Road, thence across Cathell Road in a southeasterly direction to Turville Creek, thence in an easterly direction along Turville Creek to Maryland Route 589 and the intersection with the boundary line of Election District No. 6.

Section 5. BE IT ENACTED BY THE COUNTY COMMISSIONERS OF WORCESTER COUNTY, MARYLAND THAT Section 3-107 be ADDED to the County Government Article of the Code of Public Local Laws of Worcester County, Maryland to read as follows:

3-107. Change in Boundary Line Between Election District No. 3 and Election District No. 10: The boundary line between the Berlin Election District No. 3 and the Ocean City Election District No. 10 is hereby changed to be: Beginning in the middle of Turville Creek at the intersection of Herring Creek and Turville Creek, thence in a southerly direction

along the middle of Herring Creek for a distance of approximately 1500 feet to a prong of Herring Creek which extends in a southerwesterly direction, thence along said prong to the point where it would intersect the northerly extension of Silver Point Lane, thence in a southerly direction along the northerly extension Silver Point Lane and along the center of Silver Point Lane to its intersection with U.S. Route 50, thence along the center of U.S. Route 50 in a westerly direction to the intersection with Jerry Mack Road, thence in a southerly direction along the center of Jerry Mack Road to its terminus at a prong of Herring Creek, thence continuing in a southerly direction to the abandoned Baltimore and Eastern Railroad right-of-way, thence in a southeasterly direction to the intersection of Sinepuxent Road and Maryland Route 611, thence in a southwesterly direction along the center of Maryland Route 611 to Eagle's Nest Road, thence in a southerly direction along Eagle's Nest Road and Bald Eagle Road to Bat Creek, thence in a southerly direction along Bat Creek to the Sinepuxent Bay, thence in a southwesterly direction following the westerly shoreline of Sinepuxent Bay to South Point, thence in a northwesterly direction across Newport Bay to the mouth of Bassett Creek and the intersection of the boundary line between Election District No. 3 and Election District No. 4.

Section 6. BE IT ENACTED BY THE COUNTY COMMISSIONERS OF WORCESTER COUNTY, MARYLAND, that Section 2-102 of the County Government Article of the Code of Public Local Laws of Worcester County, Maryland shall be AMENDED to read as follows:

2-102. Districts. For the purpose of selecting persons eligible as County Commissioners, the County shall be considered divided into five Commissioner Districts. The First Commissioner District

shall consist of the Pocomoke Election District and the Atkinson Election District. The Second Commissioner District shall consist of the Snow Hill Election District, Stockton Election District, and Newark Election District. The Third Commissioner District shall consist of the Berlin Election District. The Fourth Commissioner District shall consist of the Ocean City Election District. The Fifth Commissioner District shall consist of the Ocean Pines Election District and St. Martin's Election District. One of the County Commissioners shall be a resident of each of the five Commissioner Districts so that the Board of County Commissioners shall be composed always of a representative from each of the five Commissioner Districts.

SECTION 7. BE IT ENACTED BY THE COUNTY COMMISSIONERS OF WORCESTER COUNTY, MARYLAND, THAT SECTION 2-101 OF THE COUNTY GOVERNMENT ARTICLE OF THE CODE OF PUBLIC LOCAL LAWS OF WORCESTER COUNTY BE AMENDED TO READ AS FOLLOWS:

2-101. ELECTION; NUMBER; QUALIFICATION. AT THE GENERAL ELECTION TO BE HELD ON THE FIRST TUESDAY AFTER THE FIRST MONDAY, IN NOVEMBER, 1962, AND EVERY FOURTH YEAR THEREAFTER, THERE SHALL BE ELECTED FIVE COUNTY COMMISSIONERS WHO SHALL BE QUALIFIED VOTERS OF THE COUNTY AND HAVE RESIDED AT LEAST TWO YEARS IN WORCESTER COUNTY IMMEDIATELY PRECEDING THEIR ELECTION.

SECTION **[6]** 8. BE IT FURTHER ENACTED BY THE COUNTY COMMISSIONERS OF WORCESTER COUNTY, MARYLAND, that this Bill shall take effect forty-five days following its passage.

PASSED this 18th day of May, 1993.

ATTEST:

/s/ John A. Yankus
JOHN A. YANKUS
Chief Administrative Officer

WORCESTER COUNTY
COMMISSIONERS

/s/ John E. Bloxom
JOHN E. BLOXOM
President

/s/ Jeanne Lynch
JEANNE LYNCH

/s/ Floyd F. Bassett, Jr.
FLOYD F. BASSETT, JR.

/s/ Reginald T. Hancock
REGINALD T. HANCOCK

/s/ George M. Hurley
GEORGE M. HURLEY

APPENDIX J

42 U.S.C. § 1973
VOTING RIGHTS ACT OF 1965, AS AMENDED AND EXTENDED BY THE 1982 VOTING RIGHTS ACT AMENDMENTS
SECTION 2

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(As amended Pub. L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

FILED
JAN 20 1995
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(2)

94-995

No. 94-955

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

WORCESTER COUNTY, MARYLAND, *et al.*,

Petitioners,

v.

HONISS W. CANE, JR., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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23 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Fourth Circuit, which remanded this case to the district court for further remedial proceedings, is ripe for review by this Court at this time?

2. Whether the Fourth Circuit in this Voting Rights Act case correctly held the district court's findings of fact supporting petitioners' liability not to be "clearly erroneous?"

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No. 94-995

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1994

WORCESTER COUNTY, MARYLAND, *et al.*,

Petitioners,

v.

HONISS W. CANE, JR., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents submit this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

Plaintiffs-respondents, black voters of Worcester County, Maryland, filed this class action in November 1992 challenging the at-large, designated-post election system used to elect county commissioners. Despite Worcester's one fifth black population, never in the County's 253-year history has an African-American candidate been elected to any public county office. The black voters allege that this absolute exclusion of African Americans from county office results from interaction between Worcester's at-large election system, racially polarized voting, and social and historical conditions.

Following a trial in November 1993, the district court held for the plaintiffs, ruling that Worcester's system dilutes minority voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973, as interpreted by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In keeping with the three-pronged *Gingles* test, the trial court found first that the black population of Worcester County is sufficiently large and geographically compact to form a majority in a single-member district.[1] Pet. App.

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[1] Petitioners' statement of facts contains several inaccuracies with respect to the electoral plans submitted by plaintiffs to illustrate proof of *Gingles* factor one. At trial, plaintiffs offered three, not two, alternative single-member district plans. Two of the plans included one majority-black commissioner district among five districts, and the third

21a-22a. It and the court of appeals agreed that the plans introduced by plaintiffs to illustrate proof of *Gingles* factor one comported with traditional districting principles and did not rely upon districts that were geographically bizarre. Pet. App. 10a, n.6; 21a-22a.

Second, the court found that black voters in Worcester County are politically cohesive, usually voting for black candidates in elections in which black candidates run for office. Pet. App. 23a-27a. In contrast, white Worcester voters rarely support black candidates, thus demonstrating white bloc voting sufficient to defeat black candidates of choice and to satisfy *Gingles* factor three. The district court found that on average no more than 19 percent of white voters support black candidates. Pet. App. 30a. Petitioners do not dispute the court's findings with respect to either black political cohesion or white bloc voting, conceding that voting is racially polarized in

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plan included two majority-black commissioner districts among seven districts. Contrary to the petitioners' representation, the black voting age populations (VAP) of the majority-black districts in the five district plans were 57.8% (not 60.1%) and 62.1% (not 65.1%). Pet. App. 21a, n.4. The majority-black districts in the plaintiffs' seven-district plan included black VAPs of 55.1% and 50.1%. Also contrary to petitioners' representation, the majority black districts in plaintiffs' five-member plans were not "substantially identical," and cannot accurately be treated as one, as petitioners claim, even "for ease of reference." Pet. at 3, n.1. One of the plans included portions of Worcester County's southernmost town of Pocomoke City, while the other plan excluded Pocomoke entirely -- a rather substantial distinction, given petitioners' claimed objection to transgression of municipal boundaries. Moreover, the black voting populations of the two districts differ significantly.

Worcester County, in satisfaction of *Gingles* factors two and three.

Beyond the three *Gingles* factors, the district court assessed the array of factors set out by the Senate as pertinent to analysis of a Section 2 claim. S. Rep. No. 97-417, 97th Cong. 2d Sess. 28 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 177, 206-07. Quite contrary to petitioners' representation, the trial court made extensive findings regarding the "totality of the circumstances" that bear upon racial politics in Worcester County. *See infra* at 13-15.

Based upon findings of racially polarized voting, the history and lingering effects of racial discrimination in Worcester County, and the structure of the County's election system, the court concluded that Worcester's at-large, designated-post system "interacts with past and present discrimination to deprive African-Americans of Worcester County [of] the same 'opportunity as other members of the electorate to participate in the political process and to elect representatives of their choice.'" Pet. App. at 31a, *quoting* 42 U.S.C. § 1973(b).

Although the court solicited County proposals to remedy the Section 2 violation, Worcester County proposed only a plan that would have maintained an at-large, designated-post system. The court rejected Worcester's plan and ordered the County to implement a cumulative voting plan, reasoning that this plan would be more consistent with the County's preference for at-large voting than would a single-member district plan.

The United States Court of Appeals for the Fourth Circuit unanimously affirmed the district court's ruling that Worcester's election system dilutes minority voting strength in violation of the Voting Rights Act. However the appellate court differed with the district court's choice of a cumulative voting remedy, reversing and remanding for additional remedial proceedings. The Fourth Circuit later unanimously denied the County's petition for rehearing and suggestion for rehearing *en banc*.

The district court conducted proceedings in accord with the appellate court's mandate, and the record has been expanded through proceedings on remand. The trial court considered four proposed remedial election plans, three that were proposed by the defendants, and one that was proposed by the plaintiffs. An evidentiary hearing regarding remedies was conducted by the district court on December 2, 1994.

On January 6, 1995, the district court rejected plaintiffs' proposed single-member district plan in favor of a remedy that combines a district plan proposed by the defendants with a cumulative voting scheme.[2] Under the district court's ruling primary elections for Worcester County Commission will be conducted by defendants' proposed single-member district plan, and general elections will be conducted under a cumulative voting scheme. The plans submitted by the plaintiffs at trial to

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[2] A single copy of the district court's January 6 Memorandum and Order has been lodged with the Clerk's office of this Court.

illustrate proof of *Gingles* factor one play no part in the remedy adopted by the court.

On January 10, 1995, the Worcester County Commissioners noticed an Appeal of the district court's new remedial ruling to the United States Court of Appeals for the Fourth Circuit.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision is an interlocutory opinion that remanded the case to the district court for further proceedings. As such, it is not yet ripe for review by this Court.

Furthermore, the Fourth Circuit's decision does not present the questions raised in the petition for certiorari. Rather, petitioners seek to have this Court review and disturb the factual findings entered by the district court and affirmed by the Fourth Circuit on appeal. Because it is not the general practice of this Court to engage in review of factual findings concurred in by two courts below, the petition should be denied.

REASONS FOR DENYING THE WRIT

I. THE OPINION BELOW REMANDING THIS CASE FOR FURTHER REMEDIAL PROCEEDINGS IS NOT RIPE FOR REVIEW

The Fourth Circuit remanded this case to the district court for further proceedings. Pet. App. 15a-16a.

These additional proceedings have altered the posture of the case and changed the issues presented, thereby affecting the appropriateness of review by this Court, particularly when petitioners are seeking to present constitutional issues. At this time, the case simply is not ripe for plenary review. *See, e.g., Virginia Military Institute v. United States*, 113 S.Ct. 2431 (1993) (Scalia, J., concurring in denial of certiorari)(case not ripe for Supreme Court review where court of appeals remanded for determination of remedy); *Brotherhood of Locomotive Fireman v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967)("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916) ("except in extraordinary cases, the writ [of certiorari] is not issued until final decree"); *see generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 195-98 (7th ed. 1993). No reason exists here to depart from the general rule against review of interlocutory judgments.

In the interim between Worcester County's filing of its petition in this Court and respondents' filing of this response, the district court has ordered implementation of a new remedial plan. That plan has not yet been reviewed by the Court of Appeals, although such review is pending. It would usurp the role of the Court of Appeals for plenary review to be undertaken at this juncture. Moreover, such premature review would run contrary to the restraint usually exercised by this Court:

> No rule of practice of this Court is better settled than "never to anticipate a question

> of constitutional law in advance of the necessity of deciding it."

Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 71-72 (1961) (citations omitted).

The interlocutory nature of the decision below also requires rejection of petitioners' suggestion that this Court "withhold its disposition" of the petition pending resolution of certain constitutional challenges to congressional redistricting plans. Pet. at 21. Even if, contrary to fact (*see infra* at 9-12), the constitutional cases relied upon by petitioners raised issues relevant to disposition of this case, the courts below should and will have a full opportunity to address any new decisions in the course of the further proceedings being conducted herein.

II. NO SPECIAL OR IMPORTANT REASON FOR THE ISSUANCE OF A WRIT OF CERTIORARI EXISTS AS REQUIRED BY RULE 10

This case is a "first generation" challenge to racial discrimination in Worcester County's political system, more akin to cases litigated in the 1970s across the Deep South than to those raising 1990s nuances. As such, it presents no issue under the Voting Rights Act that is significant or novel. It, therefore, poses no issues meriting plenary review by this Court.

A. Petitioners Seek Review of Factual Findings Entered by the Trial Court and Affirmed by the Court of Appeals

The courts below found that the electoral plans submitted by plaintiffs to illustrate proof of *Gingles* factor one closely followed traditional districting principles and triggered no concerns about "racial gerrymandering." These decisions concerning plaintiffs' proof of *Gingles'* geographical compactness element are consistent with the decisions of this Court and the courts of appeals. Petitioners have cited no case illustrating any conflict among the circuits with respect to this element of a Section 2 claim. Indeed, other circuit courts that have addressed this issue in the post-*Shaw* era have ruled just as did the Fourth Circuit here. *See, e.g., Clark v. Calhoun County, Miss.*, 21 F.3d 92, 96 (5th Cir. 1994); *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 277-78 (2d Cir. 1994), *vacated on other grounds*, 115 S.Ct. 35 (1994).

The Fourth Circuit found that plaintiffs' illustrative plan "is not geographically bizarre. Rather, it is similar in appearance to one of the former residency districts" under the County's prior electoral schemes. Pet. App. at 10-11a, n.6. Also contrary to petitioners' allegations, the court of appeals held

> the undisputed evidence indicated that the single-member district plans proposed by Plaintiffs adhered to other traditional

> districting principles such as the historical north-south division of the County and the natural boundaries created by County waterways. In addition, the uncontradicted evidence before the district court revealed that the citizens within the proposed majority African-American district shared common socioeconomic and political concerns. *Shaw,* 113 S.Ct. at 2827. Drawing districts based on such common interests is perhaps one of the most often invoked districting principles. *See, e.g., Gaffney v. Cummings,* 412 U.S. 735, 752-53 (1973).

Id.

Petitioners claim this case is similar to *United States v. Hays,* 63 U.S.L.W. 3454 (Dec. 13, 1994), and other constitutional challenges to congressional redistricting plans now pending in this Court. Pet. at 10-12 & n.3. It simply is not such a case. Plaintiffs' single-member district plan ultimately was employed only for proof of *Gingles* factor one, not as a court-ordered remedial plan. Any issue petitioners might have raised under *Shaw* with respect to plaintiffs' plan evaporated with the district court's January 6 decision deferring to the County's opposition to that plan for remedial use.

Hays and the other progeny of *Shaw v. Reno* raise Fourteenth Amendment claims. Various three-judge district courts have disagreed about the meaning and

reach of *Shaw*, thus presenting an issue for resolution by this Court concerning the proper evaluation of constitutional challenges to congressional redistricting plans.

This case, by contrast, presents a statutory challenge to minority vote dilution in county government. Plaintiffs raised no constitutional issue, and Worcester County advanced no constitutional defense in answering plaintiffs' complaint. The courts below evaluated the plaintiffs' Section 2 claim as directed by this Court in *Thornburg v. Gingles*. Neither the district court nor the Fourth Circuit had occasion to consider *Shaw*-type questions, except to conclude that plaintiffs' proposed plans were not bizarrely shaped and were based on traditional districting principles. The court had no occasion to consider, for example, what state interests supported any particular remedial plan, or how best to tailor the plan to achieve the state's interests, because the County, being opposed to a remedy, advanced no interests to support a remedy. Plaintiffs are private actors, not government officials. As such, they are not situated to articulate the state's compelling interests in overcoming minority vote dilution, nor are they authorized to determine how the county government might decide to tailor a plan to remedy vote dilution. Courts can only review state interests and rationales when they are advanced by the state.

The County's argument that plaintiffs violated *Shaw v. Reno* by taking race into account in complying with the first prong of *Gingles* is plainly frivolous. Pet. at

2. *Gingles* requires plaintiffs in Section 2 cases to take race into account in determining whether it is possible to create majority-minority districts. To accept the County's argument would render *Gingles* a nullity, and would preclude any finding of Section 2 liability or any remedy for minority vote dilution.

This Court unanimously rejected an argument similar to that raised by Worcester County in *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). In *Voinovich*, the district court concluded that "§ 2 prohibits the creation of majority-minority districts unless such districts are necessary to remedy a statutory violation." 113 S.Ct. at 1156. The Court disagreed. It held that Section 2 contains "no *per se* prohibitions against . . . majority-minority districts," and approved the *Gingles* requirement that Section 2 plaintiffs "must show that the minority group 'is sufficiently large and geographically compact to constitute a majority in a single-member district.'" 113 S.Ct. at 1157. The County's argument in this case would have merit only if the Court were to conclude that Section 2 was itself unconstitutional, a position rejected by the majority in *Holder v. Hall*, 114 S.Ct. 2581 (1994).[3]

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[3] Seven members of the Court, either explicitly or by necessary implication, rejected Justice Thomas's argument in *Holder* that the Court's Section 2 vote dilution jurisprudence was "repugnant to . . . the ideal of a color-blind Constitution." 114 S.Ct. at 2598. *Id.* at 2588 ("*Stare decisis* concerns . . . require me to reject Justice THOMAS' suggestion that we overhaul our established reading of § 2") (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2621 n.3 (the *Gingles* vote dilution analysis applies to "the case before us") (Blackmum, J., dissenting); *id.* at 2627 ("[i]t is crystal clear that Congress intended the 1982 amendment to cover non-access claims

B. The Trial Court's Liability Ruling Rests upon Extensive Factual Findings as to the Totality of Circumstances.

Secondarily, petitioners contend that review should be granted based upon their claim that the trial court failed to consider the totality of the circumstances in ruling Worcester's election system unlawful. In fact, the court thoroughly reviewed all factors pertinent to analysis of a Section 2 claim, and rested its decision on the overwhelming proof of minority vote dilution evidenced through this evaluation.

First and foremost, the court noted the striking historical exclusion of African-American candidates from public office in Worcester County:

> [I]n the entire history of Worcester County, with a 20% African-American population, no African-American has won a county office in a county-wide head-to-head contest against a white candidate. *Gingles*, 478 U.S. at 48, n.15 (one of the "most important" of the Senate Report factors in demonstrating

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like those in *Bolden* and *Gomillion*") (Stevens, J., dissenting); *id.* at 2586 ("[i]n a § 2 vote dilution suit . . . a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice") (Kennedy, J., plurality opinion). In vote dilution challenges such as this, that benchmark may properly be a system containing one or more majority-minority districts. *Id.* at 2589 (O'Connor, J., concurring in part and concurring in the judgment).

> inequality of electoral opportunity is "the extent to which minority group members have been elected to public office in the jurisdiction.")

Pet. App. 30a.

The court carefully analyzed racially polarized voting, Pet. App. 23a-31a, the second "most important" of the Senate Report factors, *Gingles*, 478 U.S. at 48, n.15, and found that it existed, a fact that is uncontested by petitioners. The trial judge further held that by structuring its system with candidate residency districts, Worcester has employed the equivalent of an "anti-single-shot" provision, a feature that "aggravates the political disadvantage of the County's minorities." Pet. App. 30a. Furthermore, petitioners fail to mention that the trial court took judicial notice of hundreds of facts and circumstances concerning the County's egregious history of racial discrimination and the lingering, debilitating effects of that history upon Worcester's black citizens. Among the facts so noticed were the enactment of state and local disenfranchisement schemes such as literacy tests and property ownership requirements for voters and candidates;[4] white voters' overwhelming past support -- lasting into the 1970s -- for racist and segregationist candidates and causes; *de jure* segregation of schools, universities, and public accommodations through the

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[4] Indeed, the property-ownership requirement for County Commission candidates remained a part of the Worcester County Code until midway through litigation of this action.

1960s; and racial segregation of fraternal organizations, churches, and private social life continuing into the present.

This discrimination results today, the court found, in severe socioeconomic disparities between black and white citizens, and manifests itself in gross racial disparities in voter registration and turnout rates. For example, the trial judge took notice that the 1990 voter registration rate for white Worcester Countians was 77 percent, but only 32 percent for black Worcester residents. The County did not dispute these facts.

It would be an unjustified departure from established Supreme Court practice for a writ of certiorari to be granted merely to review factual findings concurred in by two courts below. *See, e.g., Blau v. Lehman*, 368 U.S. 403, 408-09 (1962); *Faulkner v. Gibbs*, 338 U.S. 267, 268 (1949); *Baker v. Schofield*, 243 U.S. 114, 118 (1917). *See generally, Supreme Court Practice*, at 189-91. As explained by Justice Brennan, the so-called "two court rule" not only accords due deference to the courts below, but also

> is an indispensable judicial "time saver," making it unnecessary for this Court to waste its scarce time and resources on minor factual questions which have already been accorded consideration by two federal courts and whose resolution is without significance except to the parties immediately involved.

Neil v. Biggers, 409 U.S. 188, 203 (1972)(Brennan, J., concurring in part and dissenting in part.)

Here comprehensive factual findings were entered by the trial judge as to the *Gingles* factors and the totality of circumstances contributing to vote dilution in Worcester County. Upon review of these findings, the Fourth Circuit agreed with the district court that the overall facts of this case lead to the inexorable conclusion that Worcester's at-large, designated-post election system violates Section 2 of the Voting Rights Act.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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OCTOBER TERM, 1994

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v.

HONISS W. CANE, JR., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners Worcester County, Maryland, *et al.*, submit the following reply to Respondents' Brief in Opposition ("Opp."). As demonstrated below, Respondents' arguments are without merit, and this Court should grant the Petition for a Writ of Certiorari ("Pet.").

I. THIS CASE IS RIPE FOR REVIEW

Respondents first argue that this case is not ripe for review because the judgment is not final. Opp. at 6-8. Yet Respondents' own authority states that "[t]he Supreme Court has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals and other

federal courts whose judgments are reviewable pursuant to § 1254(1). Invocation of such jurisdiction . . . is not conditioned on the finality of the judgment or order in question." Robert L. Stern *et al.*, Supreme Court Practice 195 (7th ed. 1993). Indeed,

> [i]n a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court, so that there is no longer any final judgment. Some opinions suggest that certiorari should be available only to review a ruling that is "fundamental to the further conduct of the case," as if somehow exceptional circumstances are required, and at times certiorari has been denied with an express statement that the case was not yet ripe for review. Yet certiorari has been granted to review many nonfinal dispositions without any further explanation, even over dissenting objection that the case was not yet ready for review. The truth of the matter is that any court of appeals ruling that reverses a final judgment and requires further proceedings is fundamental to the further conduct of the case. Review is granted or denied according to a wide range of concerns, some of which bear on the finality of the disposition below, and many of which do not.

17 Charles A. Wright *et al.*, Federal Practice and Procedure: Jurisdiction and Related Matters § 4036, at 29-32 (2d ed. 1988) (footnotes omitted).

Here, the Court should grant certiorari because this case presents an issue of extraordinary public importance: whether liability under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, may rest on the possibility that a non-compact majority-minority district can be drawn when that district conflicts with this Court's decision in *Shaw v. Reno*, 113 S. Ct. 2816 (1993). This issue is one that impacts literally thousands of cities, counties, and other local governmental entities. It does not involve a matter of merely private interest, and its resolution does not

depend on further development of a trial record.[1] In short, this case is one in which "a United States court of appeals has decided an important question of federal law . . . in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c). Consequently, Respondents' argument that this Court should deny certiorari simply because the Fourth Circuit has remanded the matter to the district court fails.

II. PETITIONERS SEEK REVIEW OF THE LOWER COURTS' LEGAL CONCLUSION REGARDING "GEOGRAPHICAL COMPACTNESS," AND DO NOT SEEK REVIEW OF FACTUAL FINDINGS

Contrary to Respondents' assertion (Opp. at 9) that Petitioners are seeking review of factual findings on the "geographical compactness" precondition of *Thornburg v. Gingles*, 478 U.S. 30 (1986), Petitioners in actuality seek review of the lower courts' legal conclusion that a racially gerrymandered majority-minority district satisfied this precondition. There is no dispute in this record concerning the following facts:

(1) the physical appearance of Respondents' proposed district; or

(2) the Respondents' intentional and exclusive use of race as the basis for drawing those boundary lines.

Indeed, the lower courts' conclusion regarding geographical compactness was the legal foundation—and the pivotal error—upon which § 2 liability was based. If that geographical compactness holding is erroneous as a matter

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[1] Respondents try to distract this Court by arguing that the Petition misstated certain facts. Regardless of the number of plans Respondents submitted that were considered by the district court (two), or the exact percentage of black voting age population in Respondents' proposed majority-minority districts, this case merits review because the lower courts' liability holdings rest on non-compact, race-based districts that violate *Shaw*.

of law, as we contend it is under *Hays*,[2] *Miller*,[3] *Vera*[4] and *Shaw*[5], then the § 2 liability determination cannot stand.

Respondents seek to insulate that legally erroneous holding from judicial scrutiny by arguing that the remedial plan imposed by the district court on remand is different from the one used to satisfy the "geographical compactness" precondition. Respondents cannot deny, however, that any remedy the district court imposes rests ultimately on its holding of § 2 liability. Nor can they deny that the linchpin of that holding was the districting plans they offered to prove the geographical compactness precondition. As we have shown, the critical feature of those plans was a non-compact district created by means of a racially motivated manipulation of boundaries for the purpose of cordoning off black enclaves to assure minority electoral success. The crucial issue presented by this Petition—whether a § 2 liability determination can be based on such a racially gerrymandered, non-compact, majority black district—*is* very much a live issue before this Court. That issue strikes at the heart of the § 2 liability holding by the lower courts. To say that issue has somehow mysteriously "evaporated" (Opp. at 10) because a remedial plan was ordered misses the point.

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[2] *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993), *vacated and remanded*, 114 S. Ct. 2731, *further proceedings on remand*, 862 F. Supp. 119 (W.D. La.), *stayed pending appeal*, 115 S. Ct. 31, *pob. juris. noted and cases consolidated*, Nos. 94-558, 94-627, 63 U.S.L.W. 3454 (U.S. Dec. 13, 1994).

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[4] *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex.), *stay granted*, C.A. No. H-94-0277, 1994 U.S. Dist. LEXIS 12334 (S.D. Tex. Sept. 2, 1994), *appeal pending*, Nos. 94-805, 94-806 (U.S.).

[5] *Shaw*, 113 S. Ct. 2816.

Furthermore, Respondents' effort to distinguish this case from *Shaw* and *Hays* falls short of the mark. Respondents argue that, unlike *Hays* and *Shaw*, which involve Fourteenth Amendment challenges to congressional redistricting, the present case involves a statutory challenge under Section 2 to a local government. But surely the applicability of the Fourteenth Amendment principle of *Shaw* and *Hays* is not restricted to congressional redistricting. The "one-person, one vote" requirement and the constitutional prohibition against intentional vote dilution—both of which stem from the Fourteenth Amendment—apply to local governments as well. *See City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Avery v. Midland County*, 390 U.S. 474 (1968). *Shaw* and *Hays*, which likewise rest on the Fourteenth Amendment, should do so as well.[6]

III. *VOINOVICH* DID NOT ADDRESS THE ISSUE BEFORE THIS COURT

Respondents claim that "[t]he County's argument that plaintiffs violated *Shaw* by taking race into account in complying with the first prong of *Gingles* is plainly frivolous." Opp. at 11. Respondents further contend that this Court rejected just such an argument in *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993). Opp. at 12.

Petitioners, however, did not argue that *Shaw* is violated whenever race is taken into account. Instead, Petitioners argued that *Shaw* prohibits the creation of non-compact districts that take only race into account, unless they are narrowly tailored to serve a compelling govern-

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[6] Respondents' argument (Opp. at 11) that the courts below "had no occasion to consider" such "*Shaw*-type questions" as whether a compelling governmental interest might exist for a non-compact district in Worcester County or whether Respondents' proposed district was narrowly tailored to further that interest likewise fails. The only reason that the lower courts failed to consider these issues, however, is that they erroneously held that Respondents' district was not "bizarre" under *Shaw*. This failure, therefore, provides no reason at all to deny the petition.

mental interest. Pet. at 8-10. For this reason alone, *Voinovich* is simply not on point. Moreover, *Voinovich* expressly reserves the issue of whether the conscious use of race in redistricting violates the Equal Protection Clause. 113 S. Ct. at 1157. For this reason as well, it lends no support to Respondents' argument.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the decision of the Court of Appeals. Alternatively, in view of the fact that this Court has recently noted probable jurisdiction in *Hays* and *Miller*, disposition of the instant petition should be withheld pending the Court's decisions in those cases.

Respectfully submitted.

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